TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 153.

FRANCIS C. WELCH, TRUSTEE, PLAINTIFF IN ERROR,

vs.

GEORGE B. SWASEY, WILLIAM H. SAYWARD, AND ARTHUR G. EVERETT, AS THE BOARD OF APPEAL FROM THE BUILDING COMMISSIONER OF THE CITY OF BOSTON.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

FILED AUGUST 8, 1904.

(20,819.)

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INDEX.

	Original.	Print.
Writ of error	1	1
Return on writ of error	2	2
Record	3	2
Petition for mandamus	4	2
Exhibit A—Application for permit to build	9	6
Petition entered and order to show cause issued	12	8
Order to show cause	13	8
Sheriff's return	14	8
Appearance for defendants	15	9
Respondents' answer	16	9
Motion to amend petition	18	10
Exhibit B—Order of July 5, 1904	19	10
C—Order of December 3, 1904	23	13
D—Order of July 21, 1905	27	17

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	Original.	Print.
Reservation	30	19
Rescript	32	20
Final order	34	20
Authentication of record	35	21
Application for writ of error	36	21
Assignment of errors	37	21
Opinion of supreme judicial court	42	24
Citation	52	28
Acceptance of service of citation	53	29
Bond on writ of error	54	29
Clerk's certificate	55	30

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Circuit Court, Massachusetts.]

The President of the United States to the Honorable the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the State of Massachusetts in which a decision could be had in the suit between Francis C. Welch, as he is Trustee under indenture of Jennie Louise Tyler, dated May 8, 1889, and recorded with Suffolk Deeds, Book 1937, Page 234, Plaintiff and George R. Swasey, William H. Sayward and Arthur G. Everett, Board of Appeal from the Building Commissioner of the City of Boston Defendants, in a plea of mandamus wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff, Francis C. Welch, Trustee, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of July, in the year of our Lord one thousand nine hundred and seven.

ALEX. H. TROWBRIDGE,
Clerk, U. S. Circuit Court,
By L. C. TUCKER,
Deputy Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by
MARCUS P. KNOWLTON,
Chief Justice of the Supreme Judicial Court of Massachusetts.

2 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

And now, here, the Judges of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston within and for the County of Suffolk make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I John Noble, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said Court this thirtieth day of July, A. D. 1907.

[SEAL.] JOHN NOBLE, *Clerk.*

3 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

To all persons to whom these presents shall come, Greeting:

Know ye, That among the records of our Supreme Judicial Court holden at Boston within and for our said County of Suffolk from the first day of January in the year of our Lord one thousand nine hundred and seven to the thirty-first day of December in said year, both days inclusive;—it is thus contained, the following being the entire record in the case:

4 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County.

FRANCIS C. WELCH, Surviving Trustee, Petitioner for Mandamus,

v.

GEORGE R. SWASEY, WILLIAM H. SAYWARD, and ARTHUR G. EVERETT, as They are the Board of Appeal from the Building Commissioner of the City of Boston.

Petition for Mandamus.

To the Honorable the Justices of the Supreme Judicial Court:

Respectfully represents your petitioner, Francis C. Welch, as he is the surviving trustee under a conveyance and indenture made by Jennie Louise Tyler, dated May 8, 1889, and recorded with Suffolk Deeds, book 1937, page 234, as follows:—

I. That on September 13, 1905, and for a long time previous to said date, your petitioner, as trustee as aforesaid, was, and still is, the owner in fee simple of a certain parcel of land, with the building thereon, numbered eight (8) Arlington street in Boston

5 in said county of Suffolk, said parcel being more particularly bounded and described as follows:—

"Easterly by Arlington street forty-seven (47) feet, southerly by adjoining house and land now or formerly of Oliver Brewster, by a line running through the middle of the brick partition wall one hundred and ten (110) feet, westerly by land now or formerly of Deming

Jarves forty-seven (47) feet and northerly by Marlborough street one hundred and ten (110) feet."

II. That the respondents, George R. Swasey, Wiliam H. Sayward, and Arthur G. Everett, were at said date, and still are, the duly constituted members of the board of appeal existing under and by virtue of section 12 of chapter 419 of the acts of 1892, and acts in addition thereto and in amendment thereof, to which board appeals may be taken from the building commissioner of the city of Boston, in accordance with section 13 of said chapter 419 of the acts of 1892, and acts in addition thereto and in amendment thereof.

III. That on September 14, 1905, your petitioner, by his duly authorized agents and architects, Walter T. Winslow and Henry F. Bigelow, duly filed with the building commissioner of the city of Boston his application for a permit to build a certain building on the premises above described, as more fully appears by the copy of said application hereto annexed and marked A, together with plans for such proposed building, as required by said commissioner.

IV. That the permit so requested by your petitioner was refused by the said building commissioner on September 26, 1905, "on the ground that the proposed structure will exceed in height the limit permitted by Chapter 333, Acts of 1904, and Chapter 383, Acts of 1905, and the reports of the respective commissions thereunder."

6 V. That on said date, September 26, 1905, your petitioner duly appealed from the decision of the building commissioner refusing such permit, to the said respondents in their official capacity as a board of appeal as aforesaid, by notifying the said building commissioner in writing, in accordance with section 13 of chapter 419 of the acts of 1892 and acts in addition thereto and in amendment thereof, as follows:—

"BOSTON, *September* 26, 1905.

James Mulcahy, Esq., Building Commissioner, Old Court House, Boston, Mass.

DEAR SIR: I understand building permit for proposed new building at 8 Arlington street in Ward 11, Boston, has been refused, for the reason that the height of the proposed new building exceeds the limit fixed by Chapter 333 of 1904 and Chapter 383 of 1905 and the reports of the respective commissions thereunder, and that such permit is refused for no other reason.

I hereby respectfully appeal to the Board of Appeal from the decision of your department refusing such permit, on the ground that the acts, and the reports of the commissions thereunder are unconstitutional and void.

Very truly yours, C. H. TYLER."

VI. That a hearing upon said appeal was held before said board of appeal on September 29, 1905, and that upon said hearing the said board of appeal affirmed the decision of the building commissioner and directed said commissioner to withhold such permit.

VII. That the record of said board of appeal relating to the decision of said board of appeal is as follows:—

"SEPT. 29, 1905—4 p. m.

Rooms of the Master Builders Association.

Present: Messrs. Swasey, Sayward & Everett.

A hearing was given in a case of appeal by Mr. C. H.
7 Tyler, Attorney for the owners of a proposed building to be erected at the corner of Arlington and Marlborough Streets from a decision of the Building Commissioner in refusing permit for such erection.

There were present:

Mr. Owen D. Young, Att'y for Appellant.

Mr. M. W. Fitzsimmons for the Building Commissioner.

After hearing it was voted:

In the appeal of Mr. C. H. Tyler from the decision of the Building Commissioner, a copy of which decision and a copy of which appeal is as follows:

"'OLD COURT HOUSE, *Sept.* 26, 1905.

Mr. C. H. Tyler, 77 Ames Building, Boston.

DEAR SIR: In regard to the proposed building # 8 Arlington Street, Ward 11, I beg to say that after examination of application for permit to erect said building, the Department has refused to issue the permit to build, on the ground that the proposed structure will exceed in height the limit permitted by Chapter 333, Acts of 1904, and Chapter 383, Acts of 1905 and the reports of the respective commissions thereunder.

Respectfully, EDWIN J. TURNER,
Deputy Building Commissioner.'

"'BOSTON, *Sept.* 26, 1905.

James Mulcahy, Esq., Building Commissioner, Old Court House, Boston, Mass.

DEAR SIR: I understand building permit for proposed new building at # 8 Arlington Street in Ward 11, Boston, has been refused for the reason that the height of the proposed new building exceeds the limit fixed by Chapter 333 of 1904 and Chapter 383 of 1905 and the reports of the respective commissions thereunder, and that such permit is refused for no other reason.

I hereby respectfully appeal to the Board of Appeal from the decision of your Department refusing such permit, on the ground that the Acts, and the reports of the commissions thereunder are unconstitutional and void.

Very truly yours, C. H. TYLER.'

8 "Upon hearing before this Board on Sept. 29th, the appellant, through his Attorney, Mr. Owen D. Young, admits and concedes that on the facts incidental to his application to erect the building in question, a permit was rightfully refused by the

Commissioner, if Statute 1904, Chapter 333 and Statute 1905, Chapter 383 and the respective reports of the commissions thereunder be constitutional, and on this admission and concession, the Board directs the Commissioner to withhold a permit.

Adjourned to 4.30.

ARTHUR G. EVERETT, *Sec'y.*"

VIII. Your petitioner represents that the decision of said board of appeal, as above set forth, is wholly erroneous, unwarranted, and void, for the following reasons:—

(1) Because chapter 333 of the acts of 1904, and chapter 383 of the acts of 1905, and the reports of the respective commissions thereunder, are in conflict with article X. of the Declaration of Rights of the constitution of Massachusetts, providing that whenever the public exigencies require that the property of any individual should be appropriated to public uses he shall receive a reasonable compensation therefor, and said statutes are therefore unconstitutional.

(2) Because chapter 333 of the acts of 1904 and chapter 383 of the acts of 1905, and the reports of the respective commissions thereunder, are in conflict with article XII. of the Declaration of Rights of the constitution of Massachusetts, providing that no subject shall be deprived of his property, immunities, or privileges, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land, and said statutes are therefore unconstitutional.

(3) Because chapter 333 of the acts of 1904 and chapter 383 of the acts of 1905 are in conflict with the constitution of Massachusetts, in that they provide for a delegation of powers and authorities properly belonging to and residing in the legislature of said commonwealth to another body or authority, namely, the commission appointed by the mayor of the city of Boston, and said statutes are therefore unconstitutional.

(4) Because chapter 333 of the acts of 1904 and chapter 383 of the acts of 1905, and the reports of the respective commissions thereunder, are in conflict with section 1 of article XIV. of the articles of amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and said statutes are therefore unconstitutional.

9 Wherefore, your petitioner prays that a writ of mandamus may issue from this honorable court, commanding the respondents, as said board of appeal, forthwith to direct said building commissioner to grant the said permit to your petitioner.

By His Attorneys, C. H. TYLER.
O. D. YOUNG.
B. E. EAMES.

Filed December 21, 1905.

A.

Plans must be filed with this application.

[SEAL.] *Application for Permit to Build.*

(1st and 2d Class Building.)

[Stamp] Sept. 14, 1905.

BOSTON, *September 13th*, 1905.

To the Building Commissioner:

The undersigned hereby applies for a permit to build, according to the following specifications:—

Location, No. Corner S Arlington & Marlboro Sts. (South)

Nearest cross street? Berkeley Ward 11.

Name of Owner? F. C. Welch Trustee Address

" Builder? Address

" Architect? Winslow & Bigelow Address 3 Hamilton Place

Plans drawn by Winslow & Bigelow Address 3 Hamilton Place

Purpose of building is? Stores and offices No. of Stores?

How many families?

How near the line of the street? On line. Width of street?

Will the building be erected on solid or filled land? Filled If in block, how many?

Size of building, No. of feet front? 25′ and 105′ No. of feet rear, 25′ 0″. No. of feet deep, 105′ 0″.

No. of stories in height, 10; No. of feet in height from sidewalk to highest point of roof, 124′ 6″.

Number of feet in height from level of sidewalk to highest part of wall? 131′ 6″.

Number of feet in height from sidewalk to eaves? 127′ 6″.

10 Will foundation be laid on earth, rock or piles? Piles Material of foundation, Granite.

External walls, 1st, 2′ 0″ 2d, 2′ 0″ 3rd, 1′ 4″ 4th, 1′ 4″ 5th, 1′ 4″ 6th, 1′ 4″ 7th, 1′ 4″ 8th, 1′ 4″ 9th, 1′ 4″ 10th, 1′ 4″.

Party walls, 1st, 2′ 4″ 2d, 2′ 4″ 3d, 2′ 0″ 4th, 2′ 0″ 5th, 1′ 8″ 6th, 1′ 8″ 7th, 1′ 8″ 8th, 1′ 8″ 9th, 1′ 8″ 10th, 1′ 4″.

Are the walls solid or vaulted? Solid.

What will be the materials of front? Stone, Brick and Steel.

Will the roof be flat, pitch, mansard or hip? Flat Material of roofing? Composition.

What will be the material of cornice? Stone.

What will be means of access to roof? Fireproof Staircase.

Length of piles? About 25′ 0″.

Number of rows? 2

Distance on centres? 3′ 0″.

Diameter top? 10″. Bottom? 6″

How capped? Granite.

Piles cut off at what grade? 5 Grade of basement? About 10.
Are there any hoistways or elevators? one How protected? Fireproof walls.
How is building heated? Steam. Thickness of shell of flue? 16″ and 12″.
Fire stops provided? Method of fire stops?
Means of extinguishing fire? Stand pipe.
Size of floor timbers, 1st floor, 2d, 3d, 4th, 5th, 6th, 7th, 8th.
Span of " " 1st " 2d, 3d, 4th, 5th, 6th, 7th, 8th.
Distance O. C., 1st " 2d, 3d, 4th, 5th, 6th, 7th, 8th.
Stairways enclosed in brick walls? In terra cotta walls.
Thickness of such walls? 4″.
Stairway halls, how finished? Marble and plaster.
If the building is to be occupied for a Tenement or Lodging House or Family Hotel, give the following particulars:—
What is the height of cellar?
What will be the height of ceiling on first story, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth.
State means of egress to be provided.
Style of egress?
11 Size of lot, No. of feet front, ; feet rear, ; feet deep.

Signature of owner or authorized representative.
WINSLOW & BIGELOW,
Address, 3 *Hamilton Place*.

Deed Lib. Folio Year .
Location, ownership and *detail* must be complete and legible.
Separate application required for every building.
Permit must be received before commencing work.

Application for Permit to Build.

First and second class building.

Location.

No. Arlington St.

Cor. Marlborough St.

Ward 11.

[Endorsed on Application.]

Sept. 29th, 1905.

In Board of Appeal this date the Board directs the Commissioner to withhold a permit

ARTHUR G. EVERETT,
Sec'y Bd. of Ap.

See letter on file.
No. —, 1905.

12 This petition was entered in this Court on the twenty first day of December, A. D. 1905, the Petitioners appearing by Charles H. Tyler, esquire.

And thereupon upon the twenty second day of said December, an order to show cause was issued, as follows, to wit:

13 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

On the foregoing petiton it is ordered, that the petitioner give notice to the said respondents to appear before the Justices of this Court — to be holden at Boston within and for said County of Suffolk, on Tuesday the ninth day of January next at 9½ o'clock a. m. by serving them with an attested copy of said petition and of this order thereon, fourteen days, at least, before said ninth day of January next that they may then and there show cause why the prayer of said petition should not be granted.

By the Court,

WALTER F. FREDERICK,
Ass't Clerk.

December 22, 1905.

14 And a return was made thereon by the officer who served the same, as follows, towit:

SUFFOLK, *ss:*

BOSTON, *December 23rd,* 1905.

I this day served the within petition and order of Court thereon upon the within named George R. Swasey and William H. Sayward and on the 26th day of December, A. D. 1905, I served the within petition and order of Court thereon upon the within named Arthur G. Everett as they are the Board of Appeal from the Building Commissioners of the City of Boston, to appear and show cause at Court as within directed by delivering in hand to the said George R. Swasey and William H. Sayward and by leaving at the last and usual place of abode of the Arthur G. Everett each an attested copy thereof.

Fees:

Service	$1.50
Copies	6.00
Travel	.40
	$7.90

ROBERT E. MAGUIRE,
Deputy Sheriff.

15 And an appearance was entered for said Respondents as follows, towit:

No. 9612.

SUFFOLK, *ss:*

Supreme Judicial Court.

Jan. 11, 1906.

WELCH, Pl'ff,
v.
BOARD OF APPEALS, D'f't.

Mandamus.

In the above action I appear for the Def'ts.

T. M. BABSON,
Corp. Counsel.

16 And on the twelfth day of January, A. D. 1906, the Respondents filed their answer as follows, to wit:

Respondents' Answer.

The respondents, for answer to the plaintiff's petition, say that they admit the allegations contained in the plaintiff's petition in paragraphs numbered I. to VII., inclusive, and that the copies of correspondence and of the records of said commissioner set forth in said petition are correct, so far as they go.

And the respondents say that a petition for mandamus is not the proper remedy for the petitioner's alleged grievances, and that the constitutionality of an act of the legislature of the commonwealth cannot be impugned or questioned in a petition for mandamus to order the respondents as such board of appeal to direct the building commissioner to issue a permit to build.

17 And respondents further say that all their actions in the premises were proper and correct.

Wherefore they pray that this petition be dismissed, and for their costs in this behalf wrongfully sustained.

By Their Attorney, THOMAS M. BABSON,
Corporation Counsel.

Filed January 12, 1906.

18 And on the nineteenth day of February, A. D. 1906, the petitioner filed a motion to amend his petition, which motion was allowed, as follows, towit:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

FRANCIS C. WELCH, Trustee, Petitioner for Mandamus,
v.
GEORGE R. SWASEY ET AL., Board of Appeal from Building Commissioners of City of Boston, Respondents.

Motion to Amend Petition.

And now comes the petitioner in the above entitled action and moves to amend his petition by inserting after paragraph numbered IV of said petition the following:

19 That at the time of said refusal of said building commissioner reports or orders of the respective commissions duly appointed under said statutes had been made as follows:—

(1) An order dated July 5, 1904, by the commission appointed under the provisions of chapter 333 of the acts of 1904, a copy of which order is hereto annexed and marked B.

(2) An order dated December 3, 1904, by said commission, revising said order of July 5, 1904, a copy of which order is hereto annexed and marked C.

(3) An order dated July 21, 1905, by the commission appointed under the provisions of chapter 383 of the acts of 1905, a copy of which order is hereto annexed and marked D.

That no other or further order was made by said commissions, or either of them, concerning the premises until some time subsequent to the decision of the board of appeal as is hereinafter more particularly set forth.

By His Attorneys, C. H. TYLER.
O. D. YOUNG.
B. E. EAMES.

B.

Commission on Height of Buildings.

[*Order of July* 5, 1904.]

The undersigned having been appointed on June seventh, 1904, by the Mayor of the City of Boston, under the provisions of chapter three hundred and thirty-three of the Acts of 1904, to be the members of the Commission on Height of Buildings in the City of Boston, and having immediately given notice and public hearings as provided in said act, hereby on this fifth day of July, 1904, make the following order establishing the boundaries of the districts in said city, designated in said act as Districts A and B, to wit:

A. The boundaries of the Districts A, hereby established, are as follows, to wit:

1. Beginning on the northerly side of that part of the said city

known as East Boston at the Chelsea-street bridge, thence
20 running southeasterly, southerly, and southwesterly through the centre of Chelsea street to Eagle square, thence westerly through said Eagle square and the centre of Eagle street to Glendon street, thence northerly through the centre of said Glendon street to Condor street, thence westerly through the centre of said Condor street to Border street, thence southerly and southwesterly through the centre of said Border street to Sumner street, thence southeasterly through the centre of said Sumner street to Orleans street, thence southwesterly through the centre of said Orleans street to Marginal street, thence southeasterly and easterly through the centre of said Marginal street to Jeffries street, thence northeasterly through the centre of said Jeffries street to Maverick street, thence northwesterly through the centre of said Maverick street to the location of the Boston, Revere Beach and Lynn Railroad, thence northerly and northeasterly along the said railroad to the property of the said city known as Wood Island park, thence southeasterly along the line dividing the said property of the said city from the property of the East Boston Company and the property of the Commonwealth to the harbor, thence southwesterly, westerly, northwesterly, northerly, northeasterly, and easterly along the said harbor and Chelsea creek, around the said East Boston to the point of beginning at said Chelsea-street bridge; meaning to include in the said District A all those portions of wards one and two of the said city, as now established by law, which are situated within the boundary line hereinbefore described.

2. Beginning on the southerly side of that part of the said city known as Charlestown at the Charlestown bridge, thence running northwesterly through the centre of said bridge and the approaches thereof to a point on said approaches immediately over the centre of the arch connecting Warren avenue with Water street, thence northeasterly through the centre of said Water street to the property of the United States known as the United States Navy Yard, thence northwesterly along the southwesterly boundary line of said property of the United States to Chelsea street, thence northeasterly through the centre of said Chelsea street to Medford street, thence northwesterly and westerly through the centre of said Medford street to the junction of said Medford street, Bunker Hill street and Main street, thence northwesterly through the centre of said Main street to the property of the said city known as the Charlestown Playground, thence northeasterly along the southeasterly boundary of said playground to the Mystic river, thence easterly, southeasterly, southerly and southwesterly along said Mystic river and the harbor around said Charlestown to the point of beginning at said Charlestown bridge; meaning to include in the said District A all those portions of wards three, four and five of the said city as now established by law, which are situated within the boundary line hereinbefore described.

21 3. Beginning on the easterly side of that part of the said city known as the City Proper at the Congress-street bridge, thence running southeasterly across said bridge to that part of the

said city known as South Boston, thence northeasterly, easterly, southeasterly, westerly, southerly and easterly around the northerly part of said South Boston and the Reserved Channel, so called, to the point on the southerly boundary of said Reserved Channel where Q street extended northerly would meet the said channel, thence southerly through the centre of said Q street to East First street, thence westerly through the centre of East First Street to I street, thence southerly through the centre of said I street to East Second street, thence westerly through the centre of said East Second street to the junction of said East Second street, Dorchester street and West First street, thence northwesterly through the centre of said West First street to Dorchester avenue, thence southerly through the centre of said Dorchester avenue to a public or private way known as Carnegie street, thence westerly through the centre of said Carnegie street to the location of the Old Colony railroad, thence southerly along said railroad to Southampton street, thence westerly through the centre of said Southampton street to Massachusetts avenue, thence northwesterly through the centre of said Massachusetts avenue to Albany street, thence northeasterly through the centre of said Albany street to Broadway, thence northwesterly through the centre of said Broadway to Washington street, thence northwesterly across said Washington street and through the centre of Pleasant street to Park square, thence northerly through the centre of said Park square to Boylston street, thence easterly through the centre of said Boylston street to Tremont street, thence northerly and northeasterly through the centre of said Tremont street to Park street, thence northwesterly through the centre of said Park street to Beacon street, thence northeasterly through the centre of said Beacon street to Bowdoin street, thence northerly through the centre of said Bowdoin street to Cambridge street, thence westerly through the centre of said Cambridge street to Staniford street, thence northerly through the centre of said Staniford street to Green street, thence northwesterly through the centre of said Green street to Leverett street, thence northwesterly through the centre of said Leverett street to the Charles river at Craigie bridge, thence northeasterly, easterly, southeasterly, southerly, and southwesterly by the said Charles river, and the said harbor around the said City Proper to the point of beginning at said Congress-street bridge; meaning to include in said District A the whole of ward six and all those portions of ward seven, eight, nine, twelve, thirteen, fourteen, fifteen, and seventeen of the said city as now established by law, which are situated within the boundary line hereinbefore described.

22 *B.* The boundaries of the Districts B hereby established are as follows, to wit:

1. All those portions of said wards one and two which are situated outside the line beginning and ending at said Chelsea-street bridge hereinbefore established as the boundary of one of said Districts A.

2. All those portions of said ward- three, four and five which are situated outside the line beginning and ending at said Charlestown bridge hereinbefore established as the boundary of one of said Districts A.

3. The whole of wards ten, eleven, sixteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four and twenty-five of the said city as now established by law, and all those portions of said wards seven, eight, nine, twelve, thirteen, fourteen, fifteen and seventeen which are situated outside the line beginning and ending at said Congress-street bridge hereinbefore established as the boundary of one of said Districts A.

Meaning to include in the said Districts B all those portions of the said city not included in the districts hereinbefore established as Districts A.

Wherever in this order the words "harbor," "river," "creek" are found, the same are intended to mean the furthest line towards deep water on said harbor, river or creek, respectively, on which the erection of wharves or other structures is permitted by the State and United States authorities.

In witness whereof, the undersigned hereto set their hands this fifth day of July, 1904.

NATHAN MATTHEWS, Jr.,
JOSEPH A. CONRY,
HENRY PARKMAN,
Commission on Height of Buildings in the City of Boston.

Boston, *July* 5, 1904.

Then personally appeared the above-named Nathan Matthews, Jr., Joseph A. Conry and Henry Parkman, and acknowledged the foregoing instrument to be their free act and deed. Before me,

JOHN E. ROUSMANIERE,
Justice of the Peace.

Boston, *July* 5, 1904.

At 4 o'clock and 35 minutes p. m. Received and entered with Suffolk Deeds, Libro 2976, page 45.

Attest: THOS. F. TEMPLE, *Register.*

23 C.

Commission on Height of Buildings.

[*Order of December* 3, 1904.]

The undersigned having been appointed on June 7, 1904, by the Mayor of the City of Boston, under the provisions of Chapter 333 of the Acts of 1904, to be the members of the Commission on Height of Buildings in the City of Boston, and having on July 5, 1904, made an order in accordance with the provisions of said chapter, which order is recorded in the Suffolk Registry of Deeds, Book 2976, page 45, hereby revise said order in the manner following:

1. By striking out, in the third clause of said order relating to Districts A, the words "a public or private way known as Carnegie Street, thence westerly through the centre of said Carnegie Street to

the location of the Old Colony Railroad, thence southerly along said Railroad," and by inserting in place thereof the words "Dexter Street, thence westerly through the centre of said Dexter Street to Ellery Street, thence southerly through the centre of said Ellery Street."

2. By striking out in said clause 3 the words "Broadway, thence northwesterly through the centre of said Broadway to Washington Street, thence northwesterly across said Washington Street and through the centre of Pleasant Street to Park Square, thence northerly through the centre of said Park Square to Boylston Street," and by inserting in place thereof the words "East Dedham Street, thence northwesterly through the centre of said East Dedham Street to Harrison Avenue, thence northeasterly through the centre of said Harrison Avenue to Troy Street, thence southeasterly through the centre of said Troy Street to Albany Street, thence northerly through the centre of said Albany Street to Broadway, thence northwesterly through the centre of said Broadway to Washington Street, thence northwesterly across said Washington Street and through the centre of Pleasant Street to Piedmont Street, thence westerly through the centre of said Piedmont Street to Ferdinand Street, thence northwesterly through the centre of said Ferdinand Street to Columbus Avenue, thence southwesterly through the centre of Columbus Avenue to a point where a line passing along the boundary line between the estates now numbered 352 and 356 on Boylston Street and extended southeasterly would meet said point on Columbus Avenue, thence from said point northwesterly along said line and between said estates above mentioned to a point in the centre of Boylston Street opposite or nearly opposite the westerly boundary of the lot on which the Arlington-Street Church now stands."

3. By inserting in said clause 3 the words "ten, eleven," between the words "nine" and "twelve."

24 4. And by striking out the words "ten, eleven," in clause 3 of that part of said order which relates to Districts B, and by inserting the words "ten, eleven," after the word "nine" in said clause.

So that so much of said order of July 5, 1904, as describes the boundaries of the Districts A and B thereby established, shall read as follows:

A. The boundaries of the Districts A, hereby established, are as follows, to wit:

1. Beginning on the northerly side of that part of the said city known as East Boston at the Chelsea-street Bridge, thence running southeasterly, southerly and southwesterly through the centre of Chelsea Street to Eagle Square, thence westerly through said Eagle Square and the centre of Eagle Street to Glendon Street, thence northerly through the centre of said Glendon Street to Condor Street, thence westerly through the centre of said Condor Street to Border Street, thence southerly and southwesterly through the centre of said Border Street to Sumner Street, thence southeasterly through the centre of said Sumner Street to Orleans Street, thence southwesterly through the centre of said Orleans Street to Marginal Street, thence southeasterly and easterly through the centre of said Marginal Street

to Jeffries Street, thence northeasterly through the centre of said Jeffries Street to Maverick Street, thence northwesterly through the centre of said Maverick Street to the location of the Boston, Revere Beach and Lynn Railroad, thence northerly and northeasterly along the said Railroad to the property of the said city known as Wood Island Park, thence southeasterly along the line dividing the said property of the said city from the property of the East Boston Company and the property of the Commonwealth to the harbor, thence southwesterly, westerly, northwesterly, northerly, northeasterly, and easterly along the said harbor and Chelsea Creek, around the said East Boston to the point of beginning at said Chelsea-street Bridge; meaning to include in the said District A all those portions of wards one and two of the said city, as now established by law, which are situated within the boundary line hereinbefore described.

2. Beginning on the southerly side of that part of the said city known as Charlestown at the Charlestown Bridge, thence running northwesterly through the centre of said Bridge and the approaches thereof to a point on said approaches immediately over the centre of the arch connecting Warren Avenue with Water Street, thence northeasterly through the centre of said Water Street to the property of the United States known as the United States Navy Yard, thence northwesterly along the southwesterly boundary line of said property of the United States to Chelsea Street, thence northeasterly through the centre of said Chelsea Street to Medford Street, thence northwesterly and westerly through the centre of said Medford Street to the junction of said Medford Street, Bunker Hill Street and Main Street, thence northwesterly through the centre of said Main Street to the property of the said city known as the Charlestown Playground, thence northeasterly along the southeasterly boundary of said Playground to the Mystic River, thence easterly, southeasterly, southerly and southwesterly along said Mystic River and the harbor around said Charlestown to the point of beginning at said Charlestown Bridge; meaning to include in the said District A all those portions of wards three, four and five of the said city as now established by law, which are situated within the boundary line hereinbefore described.

3. Beginning on the easterly side of that part of the said city known as the City Proper at the Congress-street Bridge, thence running southeasterly across said Bridge to that part of said city known as South Boston, thence northeasterly, easterly, southeasterly, westerly, southerly and easterly around the northerly part of said South Boston and the Reserved Channel, so called, to the point on the southerly boundary of said Reserved Channel where Q Street extended northerly would met the said Channel, thence southerly through the centre of said Q Street to East First Street, thence westerly through the centre of East First Street to I Street, thence southerly through the centre of said I Street to East Second Street, thence westerly through the centre of said East Second Street to the junction of said East Second Street, Dorchester Street and West First Street, thence northwesterly through the centre of said West First Street to Dorchester Avenue, thence southerly through the centre of said Dorchester Avenue to Dexter Street, thence westerly through

the centre of said Dexter Street to Ellery Street, thence southerly through the centre of said Ellery Street to Southampton Street, thence westerly through the centre of said Southampton Street to Massachusetts Avenue, thence northwesterly through the centre of said Massachusetts Avenue to Albany Street, thence northeasterly through the centre of said Albany Street to East Dedham Street, thence northwesterly through the centre of said East Dedham Street to Harrison Avenue, thence northeasterly through the centre of said Harrison Avenue to Troy Street, thence southeasterly through the centre of said Troy Street to Albany Street, thence northerly through the centre of said Albany Street to Broadway, thence northwesterly through the centre of said Broadway to Washington Street, thence northwesterly across said Washington Street and through the centre of Pleasant Street to Piedmont Street, thence westerly through the centre of said Piedmont Street to Ferdinand Street, thence northwesterly through the centre of said Ferdinand Street to Columbus Avenue, thence southwesterly through the centre of Columbus Avenue to a point where a line passing along the boundary line between the estates now numbered 352 and 356 on Boyl-
26 ston Street and extended southeasterly would meet said point on Columbus Avenue, thence from said point northwesterly along said line and between said estates above mentioned to a point in the centre of Boylston Street opposite or nearly opposite the westerly boundary of the lot on which the Arlington Street Church now stands, thence easterly through the centre of said Boylston Street to Tremont Street, thence northerly and northeasterly through the centre of said Tremont Street to Park Street, thence northwesterly through the centre of said Park Street to Beacon Street, thence northeasterly through the centre of said Beacon Street to Bowdoin Street, thence northerly through the centre of said Bowdoin Street to Cambridge Street, thence westerly through the centre of said Cambridge Street to Staniford Street, thence northerly through the centre of said Staniford Street to Green Street, thence northwesterly through the centre of said Green Street to Leverett Street, thence northwesterly through the centre of said Leverett street to the Charles river at Craigie bridge, thence northeasterly, easterly, southeasterly, southerly and southwesterly by the said Charles river and the said harbor around the said City Proper to the point of beginning at said Congress-street bridge; meaning to include in said District A the whole of ward six and all those portions of wards seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen and seventeen of the said city, as now establishd by law, which are situated within the boundary line hereinbefore described.

B. The boundaries of the Districts B hereby established are as follows, to wit:

1. All those portions of said wards one and two which are situated outside the line beginning and ending at said Chelsea-street Bridge hereinbefore established as the boundary of one of said Districts A.

2. All those portions of said wards three, four and five which are situated outside the line beginning and ending at said Charlestown Bridge hereinbefore established as the boundary of one of said Districts A.

3. The whole of wards sixteen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four and twenty-five of the said city, as now established by law, and all those portions of said wards seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen and seventeen which are situated outside the line beginning and ending at said Congress-street Bridge hereinbefore established as the boundary of one of said Districts A.

Meaning to include in the said Districts B all those portions of the said city not included in the Districts hereinbefore established as Districts A.

Wherever in this order the words "harbor," "river," "creek" are found, the same are intended to mean the furthest line toward deep water on said harbor, river or creek respectively on which the erection of wharves or other structures is permitted by the State and United States authorities.

27

In witness whereof, the undersigned hereto set their hands this third day of December, 1904.

NATHAN MATTHEWS, JR.,
JOSEPH A. CONRY,
HENRY PARKMAN,
Commissioners.

BOSTON, *December* 3, 1904.

Then personally appeared the above-named Nathan Matthews, Jr., Joseph A. Conry and Henry Parkman, and acknowledged the foregoing instrument to be their free act and deed. Before me,

JOHN E. ROUSMANIERE,
Justice of the Peace.

BOSTON, *December* 5, 1904.

At 2 o'clock p. m. Received and entered with Suffolk Deeds, Libro 3008, page 129.

Attest:

THOS. F. TEMPLE, *Register.*

D.

Report of the Commission on Height of Buildings in the City of Boston.

Order of July 21, 1905.

The undersigned having been appointed on May 25, 1905, by the Mayor of the City of Boston, under the provisions of chapter 383 of the Acts of 1905, members of a commission to determine, in accordance with the provisions of said acts, the height of buildings within the district designated by the Commission on Height of Buildings in the City of Boston, as District B, in accordance with chapter 333 of the Acts of 1904, and having given notice and public hearings, hereby determine and order that in any of the Districts B, as designated by said Commission on Height of Buildings, in

its order of July 5, 1904, as amended by its order of December 3, 1904, the said orders being recorded with Suffolk Deeds, book 2976, page 45, and book 3008, page 129, respectively, buildings may be erected on streets exceeding sixty-four (64) feet in width, to
28 a height equal to one and one quarter times the width of the street upon which the building stands; and, if situated on more than one street, the widest street is to be taken, the height to be measured from the mean grade of the curbs of all the streets upon which the building is situated, and not exceeding one hundred (100) feet, in any event.

If the street is of uneven width, its width will be considered as the average width opposite the building to be erected.

The width of a street shall be held to include the width of any space on the same side of the street upon which a building stands, upon or within which space no building can be lawfully erected by virtue of any building line established by the Board of Street Commissioners or the Board of Park Commissioners acting under general or special laws.

All streets or portions of streets upon which buildings may be erected on one side only shall be considered as of a width of eighty (80) feet as to that portion upon which buildings may be erected on one side only.

In the case of irregular or triangular open spaces formed by the intersection of streets, the width of the street shall be taken as the width of the widest street entering said space at the point of entrance.

No building shall, however, be erected on a parkway, boulevard or public way on which a building line has been established by either of said boards acting under general or special laws to a height greater than that allowed by said general or special laws, nor otherwise in violation of section 3 of said chapter 383, Acts of 1905.

No building shall be erected to a height greater than eighty (80) feet unless its width on each and every public street upon which it stands will be at least one-half its height.

Nothing in this order shall be construed as affecting any condition or restriction imposed by deed, agreement or by operation of law on any property in said Districts B.

The said Commissioners further provide that buildings may be erected to a height not exceeding one hundred and twenty-five (125) feet in that portion of the District B as established by the Commission on Height of Buildings in its order dated December 3, 1904, recorded with Suffolk Deeds, book 3008, page 129, which lies fifty (50) feet westerly from the boundary line running from Columbus avenue to the centre of Boylston street, separating said District B from District A, as established by said order; *provided, however,* that said portion of District B is owned by the same person or persons who own the adjoining premises in District A.

29 In witness whereof, the undersigned, being a majority of said commission, the third member (Nathan Matthews) being in Europe, hereto set their hands, this 21st day of July, 1905.

JOSEPH A. CONRY,
HENRY PARKMAN,
Commission on Height of Buildings in the City of Boston.

SUFFOLK, *ss:*

BOSTON, *July* 21, 1905.

Then personally appeared the above-named Joseph A. Conry and Henry Parkman and acknowledged the foregoing instrument to be their free act and deed.

Before me,

JOHN S. ADAMS,
Justice of the Peace.

BOSTON, *July* 21, 1905.

At 11 o'clock and 23 minutes a. m. Received and entered with Suffolk Deeds, libro 3059, page 477.

Attest:

THOMAS F. TEMPLE, *Register.*

IN BOARD OF ALDERMEN, *November* 8, 1905.

Read, ordered to be printed and placed on file.

JOHN T. PRIEST,
Assistant City Clerk.

30 And at a hearing on the twentieth day of said February the case was reserved by the Justice who presided at the hearing for the consideration of the Full Court, as follows, towit:—

COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court, Suffolk County.

Common Law.

FRANCIS C. WELCH, Surviving Trustee, Petitioner for Mandamus,
v.
GEORGE R. SWASEY, WILLIAM H. SAYWARD, and ARTHUR G. EVERETT, as they are the Board of Appeal from the Building Commissioner of the City of Boston.

Reservation.

In this case I find the facts to be as alleged in the petition and admitted by the answer; and upon the finding and the pleadings the case is reserved for the consideration and determination of the full court; if the statutes therein referred to are constitutional and valid, the petition to be dismissed; otherwise such order entered thereon as law and justice may require.

February 20, 1906.

HENRY K. BRALEY, *J. S. J. C.*

31 And on the first day of January A. D. 1907, a Rescript was received from the Supreme Judicial Court for the Commonwealth in the words following, towit:

32 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, January 1st, 1907.

In the case of

FRANCIS C. WELCH, Trustee,
vs.
GEORGE R. SWASEY ET AL.

pending in the Supreme Judicial Court for the County of Suffolk:

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz.,—

Petition dismissed.

By the court,

C. H. COOPER, *Clerk.*

January 1, 1907.

33 And on the ninth day of July A. D. 1907 a final order in said cause was entered in the Supreme Judicial Court for the County of Suffolk;—as follows, towit:—

34 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

No. 9612, Law.

FRANCIS C. WELCH, Surviving Trustee, Petitioner,
vs.
GEORGE R. SWASEY ET AL., Board of Appeal from the Building Commissioner of the City of Boston, Respondents.

Final Order.

And now in the above entitled cause upon consideration thereof and in accordance with a rescript from the Supreme Judicial Court of the Commonwealth,

It is ordered that the petition be dismissed; that the respondent's costs be taxed by the Clerk and paid by the Petitioner and that judgment be entered forthwith for the Respondents.

By the Court,

JOHN NOBLE, *Clerk.*

July 9, 1907.

Form of order assented to.

TYLER & YOUNG,
Attorneys for Petitioner.
THOMAS M. BABSON,
City Solicitor, Attorney for Respondents.

35 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have hereunto caused the seal of our said Court to be hereto affixed.

Witness, Marcus Perrin Knowlton, Chief Justice of our said Supreme Judicial Court, at Boston in said County, this thirtieth day of July in the year of our Lord Nineteen Hundred and Seven.

[SEAL.] JOHN NOBLE, *Clerk*.

36 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

No. —, Law.

FRANCIS C. WELCH, Surviving Trustee, Petitioner,
vs.
GEORGE R. SWASEY ET AL., Board of Appeal from the Building Commissioner of the City of Boston, Respondents.

Application for Writ of Error and Assignment of Errors.

And now comes the petitioner in the above entitled cause and respectfully represents that on the ninth day of July in the year 1907, this Court entered a final judgment in said cause in favor of the respondents and against this petitioner, in which judgment and in the proceedings had prior thereto in this Court certain errors appear, to the prejudice of this petitioner as recited in the annexed Assignment of Errors.

Wherefore, the petitioner prays that a writ of error to this Court from the Supreme Court of the United States may issue in his behalf for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

By His Attorneys, TYLER & YOUNG.
B. E. EAMES.

37 UNITED STATES OF AMERICA:

Supreme Court of the United States.

FRANCIS C. WELCH, Surviving Trustee, Plaintiff in Error,
vs.
GEORGE R. SWASEY ET AL., Board of Appeal from the Building Commissioner of the City of Boston, Defendants in Error.

Assignment of Errors by Plaintiff in Error.

The petitioner in the above entitled cause in connection with his application for a writ of error makes this the following assignment of errors:—

1. The Court erred in deciding that those parts of Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, which provide that the city of Boston shall be divided into districts of two classes and that no building shall be erected to a height of more than 125 feet above the grade of the street in districts of one class and that no building shall be erected to a height of more than 80 feet above the grade of the street in districts of the other class, are not in violation of the Constitution of the United States.

2. The Court erred in deciding that those parts of Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by the provisions of Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, whereby it is provided that the city of Boston shall be divided into districts of two classes
38 to be designated districts A and B, and to be determined in such manner that districts A shall comprise those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes and districts B shall comprise those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial, and whereby there is established in districts A a limitation in the height to which any buildings may be there erected of 125 feet and in districts B a varying limit in height of from 80 feet to 100 feet, the height between said limits to be determined in accordance with rules to be fixed by a commission as therein provided, are not in violation of the Constitution of the United States.

3. The Court erred in deciding that said Legislature could limit the height of any building to be erected upon the petitioner's land to 100 feet, without making provision for compensation to the petitioner on account of such limitation.

4. The Court erred in deciding that said Legislature could limit the height of any building to be erected upon the petitioner's land to a height less than 124 feet 6 inches, the height stated in his application for a permit to build, to compel the issuance of which this action was originally brought, without making provision for compensation to the petitioner on account of such limitation.

5. The Court erred in deciding that said Legislature could place any limitation upon the height to which any building could be erected upon the petitioner's land, without making provision for compensation to the petitioner on account of such limitation.

39 6. The Court erred in deciding that said Legislature could establish, over the whole or any part of the territory comprised within the city of Boston, any limitation of the height to which any building might be there erected, lower than the height called for by the petitioner's application for a permit to build, without providing compensation on account of such limitation to the owners of the premises affected thereby.

7. The Court erred in deciding that said Legislature could provide, either directly or indirectly that the height of any building to be erected on the petitioner's land should be limited to a height less

than that called for by the petitioner's application for a permit to build, while permitting the erection of buildings to said height or to a greater height in other parts of said city, without providing compensation to the petitioner on account of such difference in the height permitted.

8. The Court erred in deciding that said Legislature could provide that a limit of height should be imposed upon buildings to be erected in certain parts or districts of the city of Boston, lower than was imposed upon buildings to be erected in other parts or districts of said city, without providing compensation to the owners of premises affected by such lower limitation on account of such difference in the height permitted.

9. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit the height of buildings to 125 feet above the grade of the street in those parts or districts of the city of Boston in which all or the greater part of the buildings situate therein were at the time of such division into districts used for business or commercial purposes, and could impose a lower limit, to wit, from 80 to 100 feet, in other parts of said
40 city of Boston, including the premises of the petitioner.

10. The Court erred in deciding that said Legislature could provide that the city of Boston should be divided into districts of two classes and a limitation of height placed upon buildings in districts of one class different in amount from the limitation placed upon buildings in districts of the other class.

11. The Court erred in deciding that said Legislature, either directly or through any commission, could, without providing compensation therefor, prohibit the erection of any building to the height called for by your petitioner's application for a permit to build, or to a height greater than 100 feet, in certain parts of the city of Boston, to wit, upon all premises in the greater portion of said districts B, while permitting the erection of buildings to the said height or to the height of 125 feet upon other premises in said districts B, provided said premises lie within 50 feet from the boundary line separating said district B from any of said districts A, and provided said boundary line divides said premises from other adjoining premises both owned by the same person or persons.

12. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit or restrict the height of buildings generally in any portion or portions of said city of Boston, at the same time excepting from the operation of such limitation or restriction grain or coal elevators and sugar refineries.

13. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit the height of buildings to 100 feet in certain parts of the city of Boston, to wit, those parts or districts in which all or the greater part of the buildings
41 situate therein were at the time of the determination thereof used for residential purposes or for purposes not business or commercial, without imposing a similar and equal limitation in any other city or place in said Commonwealth.

14. The Court erred in deciding that said Legislature could, with-

out providing compensation therefor, impose a lower limit of height upon buildings in certain portions of the city of Boston than was imposed in any other city or in any other place in said Commonwealth.

15. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, is not in violation of the Constitution of the United States.

16. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, is not in violation of the 14th Amendment of the Constitution of the United States.

17. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, does not purport to authorize any taking of property without due process of law or deny to any person the equal protection of the laws within the meaning of the 14th Amendment of the Constitution of the United States.

42 COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *July* 26, 1907.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Francis C. Welch, trustee, *vs.* George R. Swasey & others decided on the 1st day of January, 1907.

HENRY W. SWIFT,
Reporter of Decisions.

43 KNOWLTON, *C. J.*:

The principal question presented by this case is whether the St. 1904, c. 33, and the St. 1905, c. 383, and the orders of the commissioners appointed under them, relative to the height of buildings in Boston, are constitutional. A jurisdictional question, if the petitioner is entitled to relief, is whether a remedy can be given him by a writ of mandamus.

The principal question may be sub-divided as follows: First, can the Legislature, in the exercise of the police power, limit the height of buildings in cities so that none can be erected above a prescribed number of feet; second, can it classify parts of a city so that in some parts one height is prescribed and in others a different height; third, if so, can it delegate to a commission the determination of the boundaries of these different parts, so as to conform to the general provisions of the statute; fourth, can it delegate to a commission the making of rules and regulations such as to permit different heights in different places, according to the different conditions in
44 different parts of one of the general classes of territory, made in the original statute; fifth, if it can are the rules and regu-

lations made by the commissioners within the statute, and within the constitutional authority of the Legislature and its agents?

In the exercise of the police power the Legislature may regulate and limit personal rights and rights of property in the interest of the public health, public morals and public safety. Com. *vs.* Pear, 183 Mass. 242; Com. *v.* Strauss, 191 Mass., 545, (78 N. E. Rep., 136) California Reduction Co. *v.* Sanitary Works, 199 U. S. 306-318. With considerable strictness of definition, the general welfare may be made a ground, with others, for interference with rights of property, in the exercise of the police power. Com. *v.* Strauss, *ubi supra.*

The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light and air, and thus to affect the public health. It may also increase the danger to persons and property from fire, and be a subject for legislation on that ground. These are proper subjects for consideration in determining whether, in a given case, rights of property in the use of land should be interfered with for the public good. In Attorney-General *v.* Williams, 174 Mass., 476, this court said: "Regulations in regard to the height and mode of construction of buildings in cities are often made by legislative enactments, in the exercise of the police power, for the safety, comfort and convenience of the people, and for the benefit of property owners generally.
45 The right to make such regulations is too well established to be questioned. Watertown *v.* Mayo, 109 Mass., 315; Salem *v.* Maynes, 123 Mass., 372; Sawyer *v.* Davis, 136 Mass., 239." In People *v.* D'Oenich, 111 N. Y., 359, a statute limiting the height of dwelling houses to be erected in the city of New York was treated as unquestionably constitutional. See 1 Abbott Mun. Corp. 237; 2 Tiedeman on State and Federal Control, 754. There is nothing in Parker *v.* Com., 178 Mass., 199, against the validity of the statutes now before us. That case was decided upon the construction given by the court to the legislative act under which it arose. The court held that the Legislature had not assumed to determine that any limitation of the height of buildings on the designated streets was required, in the interest of the public health and public safety, or of the public welfare, and it left open the question whether the Legislature might have made the restriction, without providing compensation, if it had declared in the statute that no damages should be paid. It is for the Legislature to determine whether the public health or public safety require such a limitation of the rights of land owners in a given case. Upon a determination in the affirmative, they may legislate accordingly.

The next question is whether the General Court may establish different heights for different neighborhoods, according to their conditions and the uses to which the property in them is put. The statute should be adapted to the accomplishment of the purposes in which it finds its constitutional justification. It should be reasonable, not only in reference to the interests of the public, but also in reference to the rights of land owners. If these rights
46 and interests are in conflict in any degree, the opposing considerations should be balanced against each other, and each

should be made to yield reasonably to those upon the other side. The value of land and the demand for space, in those parts of Boston where the greater part of the buildings are used for purposes of business or commerce, is such as to call for buildings of greater height than are needed in those parts of the city where the greater part of the buildings are used for residential purposes. It was, therefore, reasonable to provide in the statute that buildings might be erected to a greater height in the former parts of the city than in the latter, even if some of the streets in the former are narrower than those in the latter.

The general subject is one that calls for a careful consideration of conditions existing in different places. In many cities there would be no danger of the erection of high buildings in such locations and of such a number as to affect materially the public health or safety, and no statutory restrictions are necessary. Such restrictions in this country are of very recent origin, and they are still uncommon. Unless they place the limited height at an extreme point, beyond which hardly anyone would ever wish to go, they should be imposed only in reference to the uses for which the real estate probably will be needed, and the manner in which the land is laid out, and the nature of the approaches to it.

It was decided in Com. *v.* Boston Advertising Co., 188 Mass. 348, that a statute of this kind cannot constitutionally be passed for a mere æsthetic object. It was said in Attorney-General *v.*
47 Williams, 174 Mass., 476-480, that the statute then before the court, enacted under the right of eminent domain, with compensation for land owners, would have been unconstitutional if it had been passed "to preserve the architectural symmetry of Copley Square," or "merely for the benefit of individual property owners." The inhabitants of a city or town cannot be compelled to give up rights in property, or to pay taxes, for purely æsthetic objects; but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in, as auxiliary. We are of opinion that the provision of the St. 1904, c. 333, for dividing parts of the city into two classes, in each of which there is a prescribed limit for the height of buildings, was within the power of the Legislature, and in accordance with the constitutional principle applicable to the enactment.

The delegation to a commission of the determination of the boundaries of these parts for the two classes was within the constitutional power of the General Court. The work of the commissioners under the first act was not legislation, but the ascertainment of facts, and the application of the statute to them for purposes of administration. Such subsidiary work by a commission is justified in many cases. Com. *v.* Plaisted, 148 Mass., 375; Brodbine *v.* Revere, 182 Mass., 598; Com. *v.* Sisson, 189 Mass. 247; Stark *v.* Boston, 180 Mass., 293; Kingman, Petitioner, 153 Mass., 566; Taunton *v.* Taylor, 116 Mass., 254; Nelson *v.* State Board of Health, 186 Mass., 330; Com. *v.* Bennett, 108 Mass., 27; Field *v.* Clark, 143 U. S., 649-692. *In re* Pollock, Petitioner, 165 U. S., 526.

The delegation to a commission of the power to fix different
48 heights in different places in the parts included in Class B., under the St. 1905, c. 383, goes further, and allows the commissioners to make rules and regulations which are in the nature of subsidiary legislation. This is within the principle referred to in Brodbine *v.* Revere, *ubi supra*, and in some of the other cases above cited. It is that, under our system in Massachusetts, matters of local self-government might always be intrusted to the inhabitants of towns. On the establishment of cities this power is exercised by the city council, or by some board or commission representing the inhabitants. Even in towns such powers have long been exercised by local boards, for example, by the board of health. Originally such representatives of the local authority were elected by the people; but for many years local boards, appointed by the governor or other executive authority, have sometimes been entrusted with the exercise of this legislative authority. It is true that they are further from the people than the members of a city council, for whom the people vote, but in a true sense they represent the inhabitants in matters of this kind. Our decisions cover this point also. Com. *v.* Plaisted, Brodbine *v.* Revere, *ubi supra*. It does not follow that all rules and regulations made under such a delegation of authority would be constitutional, merely because the original statute is unobjectionable. Such rules may be tested by the courts to see whether they are reasonably directed to the accomplishment of the purpose on which the constitutional authority rests, and whether they have a real, substantial relation to the public objects which the government can accomplish. A statute, ordinance or regulation will not be held void merely because the judges differ from the
49 legislators as to the expediency of its provisions. But if it is arbitrary and unreasonable, so as unnecessarily to be subversive of rights of property, it will be set aside by the courts. Matter of Jacobs, 98 N. Y., 98-110; People *v.* Gillson, 109 N. Y., 389-403; Health Dept. *v.* Rector, 145 N. Y., 32-40; C. B. & Q. Railway *v.* Drainage Commissioners, 200 U. S., 561-593; California Reduction Company *v.* Sanitary Works, 199 U. S. 306-318; Lawton *v.* Steele, 152 U. S. 133-137; Dobbins *v.* Los Angeles, 195 U. S., 223-235-238; Jacobson *v.* Massachusetts, 197 U. S., 11-28-31.

We do not see that the action of the commissioners, under the St. 1905, was beyond their power under the constitution. It was seemingly in accordance with the general purpose of the Legislature, and was directed to considerations which they deemed proper in adjusting the rights and interests of property owners and the public. The question is not whether the court deems all the provisions wise; but whether they appear to be outside of the constitutional power of the commission. In prescribing heights in the district, the commissioners might make the width of the streets on which a building was to be erected one factor to be considered. Their action in this particular relates wholly to buildings in Class B., which includes only the residential parts of the city.

We cannot say that the prohibition of the erection of a building of a greater height than eighty feet in class B, unless its width "on

each and every public street on which it stands will be at least one-half its height," was entirely for æsthetic reasons. We conceive that the safety of adjoining buildings, in view of the risk of the
50 falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and the orders of the commissioners are constitutional.

We think that the court has jurisdiction to dispose of the case on the merits, under this petition for a writ of mandamus. The wrong alleged is that the building commissioner, and afterwards the board of appeal, refused to give the petitioner a permit to erect a building. It is conceded that he was not entitled to a permit if the statutes and orders referred to are constitutional. The petitioner alleges that the board of appeal refused to do their duty, and that his only effectual remedy is by a writ of mandamus, ordering them to grant a permit. The case comes within the general rule giving jurisdiction to issue such writs. Farmington River Water Power *v.* County Commissioners, 112 Mass., 206-212; Carpenter *v.* County Commissioners, 21 Pick., 258-259; Attorney-General *v.* Boston, 123 Mass., 460. See Locke *v.* Selectmen of Lexington, 122 Mass., 290; Attorney-General *v.* Northampton, 143 Mass. 589.

The building commissioner and the board of appeals are not judicial officers. Sts. 1892, c. 419; 1894, c. 443. The fact that a refusal to act is founded on a mistake of law does not preclude a remedy by a writ of mandamus. In cases where the duty to perform an act depends solely on the question whether a statute or ordinance is constitutional and valid, the question may sometimes be determined on a petition for a writ of mandamus. Attorney-General *v.* Boston, 123 Mass., 460; Warren *v.* Charlestown, 2 Gray, 84; Larcom *v.* Olin, 160 Mass., 102-110.

Petition dismissed.

51 [Endorsed:] Francis C. Welch, Tr. *vs.* George R. Swasey, *et als.* Certified copy of the opinion of the Supreme Judicial Court.

52 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to George R. Swasey, William H. Sayward, and Arthur G. Everett, as they are the Board of Appeal from the Building Commissioner of the City of Boston, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, in the city of Washington, D. C., on the* fourteenth day of August next, pursuant to a Writ of Error filed in the Clerk's Office of the† Supreme Judicial Court of Massachusetts within and for the County of Suffolk, wherein Francis C. Welch, Trustee, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error men-

tioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Marcus P. Knowlton, Chief Justice of the Supreme Judicial Court of Massachusetts this sixteenth day of July, in the year of our Lord one thousand nine hundred and seven.

MARCUS P. KNOWLTON.

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* Not exceeding 30 days from the day of signing.

† Name of Court to which Writ of Error is directed.

53 [Endorsed:] Boston, July 25, 1907. I accept service and I appeal for the respondents in the within entitled cause. Thomas M. Babson, Corp. Counsel, p'r A. Please enter appearance. T. M. Babson.

54 [*Bond on Writ of Error.*]

Know all Men by these Presents,

That we, Francis C. Welch, as he is Trustee under indenture of Jennie Louise Tyler, dated May 8, 1889, and recorded with Suffolk Deeds, Book 1937, Page 234, as principal, and American Bonding Company of Baltimore, a corporation duly organized under the laws of the State of Maryland, doing business in Boston, Mass., as surety are held and firmly bound unto George R. Swasey, William H. Sayward and Arthur G. Everett, as they are the Board of Appeal from the Building Commissioner of the City of Boston, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said George R. Swasey, William H. Sayward and Arthur G. Everett, as they are said Board of Appeal, their certain Attorney, Executors, Administrators, successors or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, Administrators, and successors jointly and severally, by these Presents.

Sealed with our seals, and dated the 15th day of July in the year of our Lord one thousand nine hundred and seven.

Whereas lately at a sitting of the Supreme Judicial Court of Massachusetts at Boston, within and for the County of Suffolk, in a suit depending in said Court between said Francis C. Welch, Trustee, and said George R. Swasey, William H. Sayward and Arthur G. Everett, as said Board of Appeal, judgment was rendered against the said Francis C. Welch, Trustee, and the said Francis C. Welch, Trustee, having procured a writ of error and filed a copy thereof in the clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George R. Swasey, William H. Sayward, and Arthur G. Everett, as said Board of Appeal, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 14th day of August next:

Now the condition of the above obligation is such, that if the said Francis C. Welch, Trustee, plaintiff in error, shall prosecute his said writ of error to effect, and answer all damages and costs, if he fail to

make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

FRANCIS C. WELCH, [SEAL.]
Trustee as Aforesaid. [L. S.]
AMERICAN BONDING COMPANY OF BALTIMORE, [L. S.]
By BERTRAM G. WATERS, *Vice Pres't.*

Attest:
A. A. DORITY, *Ass't Sec'y.*

Signed, sealed and delivered in presence of
—— ——.

Approved:
MARCUS P. KNOWLTON,
Chief Justice of the Supreme Judicial Court of Massachusetts.
[SEAL.]

55 COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

Supreme Judicial Court.

I, John Noble, Clerk of the Supreme Judicial Court within and for the County of Suffolk, hereby certify that the foregoing are true copies of

I. The Record in the case of Francis C. Welch, Surviving Trustee, Petitioner for Mandamus, *v.* George R. Swasey, William H. Sayward and Arthur G. Everett, as they are the Board of Appeal from
56 the Building Commissioner of the City of Boston, in said Supreme Judicial Court determined and annexed to and transmitted with said Record, of

II. The Application for Writ of Error and the Assignment of Errors.

III. The Opinion of the Full Court, and of all the Proceedings in said case, with all things concerning the same, together with

IV. The Original Citation, and Acceptance of Service thereon—and Copy of

V. The Bond filed by the Plaintiff in Error.

57 In witness whereof I have hereunto set my hand and affixed the seal of said court, this thirtieth day of Feb'y in the year of our Lord Nineteen Hundred and Seven.

[SEAL.] JOHN NOBLE, *Clerk.*

Endorsed on cover: File No. 20,819. Massachusetts sup. jud. court. Term No. 153. Francis C. Welch, trustee, plaintiff in error, *vs.* George R. Swasey, William H. Sayward, and Arthur G. Everett, as the Board of Appeal from the Building Commissioner of the City of Boston. Filed August 2, 1907. File No. 20,819.

CONTENTS.

PAGE

STATEMENT OF CASE 1

ASSIGNMENT OF ERRORS 8

ARGUMENT 13

I. Introductory—the question involved 13

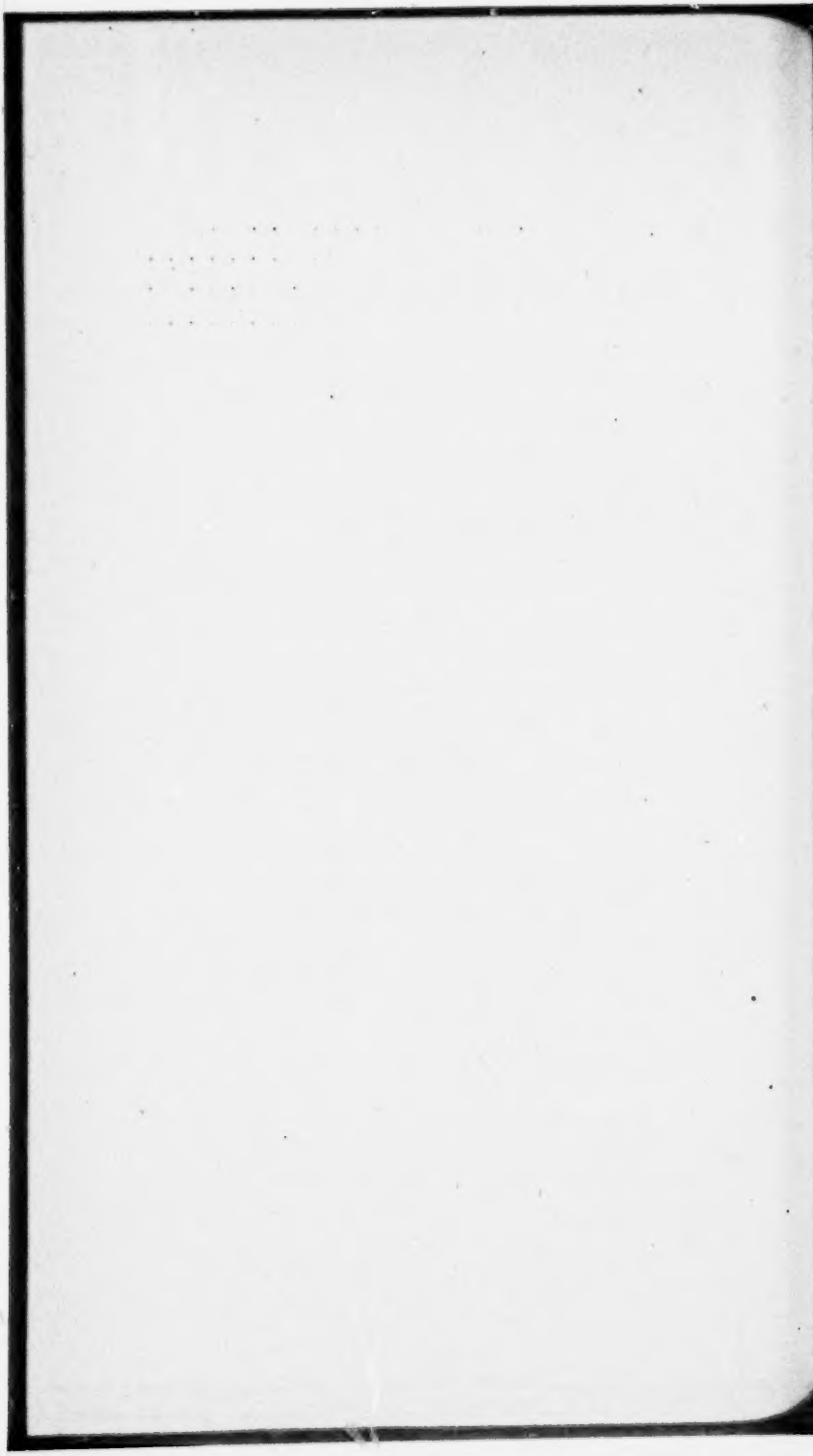
II. The purposes of the Acts are not such as justify the exercise of the police power 15
(*A*) The Court will look to the real purpose of the Statute 16
(*B*) The real purpose was æsthetic 18
(*C*) The police power cannot properly be exercised for an æsthetic purpose 21

III. The infringement upon rights of property involved in these Acts is unreasonable 22
(*A*) The principle of unreasonableness is a principle of proportionateness 22
(*B*) The extent of the infringement upon property rights here involved 31
(*C*) The infringement is disproportionate to any public necessity or end 33

IV. The classification is not reasonable with reference to the ostensible objects of public health or public safety . 41
(*A*) The kind of classification permissible under police power 41
(*B*) Judicial notice 45
(*C*) The classification involved in these Statutes is not reasonable within the rules laid down . . . 47
1. These Statutes are special laws applying to a single City in the Commonwealth; namely, the City of Boston 47
2. The classification attempted within the City of Boston itself is not based upon reasonable grounds 47
3. The Statute gives exceptional rights to property holders in Districts B, whose property is situated within fifty feet of the division line established, provided they also own land on the other side of the division line 54
4. It is provided that the height of buildings in Districts B above eighty feet shall depend upon the width of the building upon the street 55
5. The Statutes create exceptions in favor of certain occupations 56

V. Discussion of cases relied upon by the defendant in error, 58

CONCLUSION 62



Supreme Court of the United States.

FRANCIS C. WELCH, TRUSTEE,
PLAINTIFF IN ERROR,

v.

GEORGE R. SWASEY, WILLIAM H. SAYWARD, AND ARTHUR G. EVERETT,

AS THE BOARD OF APPEAL FROM THE BUILDING COMMISSIONER OF THE CITY OF BOSTON,
DEFENDANTS IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is brought before this Court by writ of error to the Supreme Judicial Court of Massachusetts to reverse a decree of that Court denying a writ of mandamus on a petition originally brought by the plaintiff in error to compel the issuance of a permit to build a certain building at the corner of Arlington and Marlborough Streets, in the City of Boston, on property there situated and owned by the plaintiff in error as Trustee.

The facts—which the Court found to be as alleged in the petition and admitted by the answer—(p. 19 of record) are as follows:—

On September 14, 1905, the plaintiff in error duly filed with the Building Commissioner of the City of Boston his application for a permit to build a certain building on the premises described, together with plans for such proposed building, as required by the Commissioner (p. 3 of record). This application called for a building one hundred twenty-four feet six inches (124 ft. 6 in.) in height, measured from the sidewalk to the highest point of the roof (p. 6 of record), and the permit was refused by the Building Commissioner:—

> "On the ground that the proposed structure will exceed in height the limit permitted by Chapter 333, Acts of 1904, and Chapter 383, Acts of 1905, and the reports of the respective Commissions thereunder" (p. 3 of record).

The plaintiff in error duly appealed from the decision of the Building Commissioner to the defendants in error, as the duly constituted Board of Appeal. A hearing was had before said Board of Appeal and the decision of the Building Commissioner was affirmed and the Commissioner was directed to withhold the permit upon the ground stated, viz., that the height of the proposed building would exceed the limit allowed by the Statutes cited (pp. 3–5 of record).

The plaintiff in error thereupon brought this petition for mandamus to compel said Board of Appeal to direct the issuance of the permit applied for.

The Statutes, which formed the basis of the refusal of the Building Commissioner and of the Board of Appeal to grant the plaintiff in error the permit desired, are:—

First. Chapter 333 of the Acts of 1904, which provides for the appointment of a commission by the Mayor of the City of Boston to divide the city into two classes of districts to be called Districts "A" and Districts "B"; the height

of buildings in Districts "A" to be limited to one hundred and twenty-five feet, and in Districts "B" to eighty feet.

Second. Chapter 383 of the Acts of 1905, which provides for the appointment of a commission to designate in what parts of said Districts "B" (which had theretofore been established in accordance with the previous Act) buildings might be erected to a height exceeding eighty feet, but not exceeding one hundred feet:—

> "And the height between 80 feet and 100 feet to which buildings may be so erected, and the conditions under which buildings may be erected to said height," etc.

For the convenience of the Court the two (2) Acts in question are here set out in full:—

(Acts of 1904, Chapter 333.)

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

Section 1. The city of Boston shall be divided into districts of two classes, to be designated districts A and B. The boundaries of the said districts, established as hereinafter provided, shall continue for a period of fifteen years, and shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial shall be in the district or districts designated B.

Section 2. Upon the passage of this act the mayor of the city shall appoint a commission of three members to be called "Commission on Height of Buildings in

the City of Boston." The commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of the districts aforesaid, and, within one month after its appointment, shall cause the same to be recorded in the registry of deeds for the county of Suffolk. The boundaries so established shall continue for a period of fifteen years from the date of the said recording. Any person who is aggrieved by the said order may, within thirty days after the recording thereof, appeal to the commission for a revision; and the commission may, within six months after its appointment, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of recording. The members of the commission shall serve until the districts have been established as aforesaid; and any vacancy in the commission caused by resignation, death or inability to act shall be filled by the mayor, on written application by the remaining members of the commission or of ten inhabitants of the city. The members of the commission shall receive such compensation as the mayor shall determine.

SECTION 3. In the city of Boston no building shall be erected to a height of more than one hundred and twenty-five feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than eighty feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers or cupolas erected for strictly ornamental purposes, of fireproof material, on buildings of the above height or less in any district. The supreme judicial court and the superior court shall each have jurisdiction in equity to enforce the provisions of this act, and to restrain the violation thereof.

SECTION 4. This act shall take effect upon its passage. (Approved May 13, 1904.)

(Acts of 1905, Chap. 383.)

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

Section 1. Within thirty days after the passage of this act the mayor of the city of Boston shall appoint a commission of three members to determine, in accordance with the conditions hereinafter provided, the height of buildings within the district designated by the commission on height of buildings in the city of Boston as district B, in accordance with chapter three hundred and thirty-three of the acts of the year nineteen hundred and four.

Section 2. Said commission shall immediately upon its appointment give notice and public hearings, and shall make an order establishing the boundaries of or otherwise pointing out such parts, if any, of said district B as it may designate in which buildings may be erected to a height exceeding eighty feet but not exceeding one hundred feet, and the height between eighty feet and one hundred feet to which buildings may so be erected, and the conditions under which buildings may be erected to said height, except that such order may provide for the erection of buildings as aforesaid to a height not exceeding one hundred and twenty-five feet in that portion of said district B which lies within fifty feet from the boundary line separating said district B from the district designated by the commission on height of buildings in the city of Boston as district A in accordance with said chapter three hundred and thirty-three, provided said boundary line divides the premises affected by such order from other adjoining premises both owned by the same person or persons, and within sixty days after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. Any person who is aggrieved by such order may, within sixty days after the recording thereof, appeal to the commission for a revision; and the commission may, previous to the first day of January in

the year nineteen hundred and six, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk and shall date back to the original date of recording. The boundaries so established shall continue for a period of fifteen years from the date of the recording of the order made by the commission on height of buildings in the city of Boston under chapter three hundred and thirty-three of the acts of the year nineteen hundred and four. The members of the commission shall receive such compensation as the mayor shall determine.

SECTION 3. Within such parts of district B as may be designated by the commission as aforesaid (which may, except as hereinafter provided, include any parts of said district B affected by prior acts limiting the height of buildings) buildings may be erected to the height fixed by the commission as aforesaid, exceeding eighty feet but not exceeding one hundred feet, or one hundred and twenty-five feet as hereinbefore provided, and subject to such conditions as may be fixed as aforesaid by the commission; but within the following described territory, to wit:—Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing northerly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, no building shall be erected to a height greater than seventy feet, measured on its principal front, and no building shall be erected on a parkway, boulevard or public way on which a building line has been established by the board of park commissioners or by the board of street commissioners, acting under any general or special statute, to a greater height than that allowed by the order of said boards; and no building upon land any owner of which has received and retained compensation in damages for any limitation of height or who retains any claim for such damages shall be erected to a height greater than that fixed by the limitation for which such damages were received or claimed.

SECTION 4. No limitations of the height of buildings in the city of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstaffs, railings, weather vanes, soil pipes, steam exhausts, signs, roof houses not exceeding twelve feet square and twelve feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

SECTION 5. This act shall take effect upon its passage. (Approved May 8, 1905.)

The property of the plaintiff in error upon which he desires to erect said building is situated in one of the districts designated "B," in which the lower limit of height is prescribed.

There was no contention that the permit was refused for any other reason than as above stated. The plaintiff in error contended that the refusal to issue a permit, on the ground that the height of the proposed building exceeded the limit permitted by the Statutes above quoted, was error, because the Statutes in question upon which said refusal was based are unconstitutional and void.

The case was heard before the Supreme Judicial Court for the County of Suffolk, and was by that Court reserved, without decision, for the determination of the Full Court (the Supreme Judicial Court for the Commonwealth), and, upon full hearing, that Court decided that mandamus was the proper remedy, but that the Statutes in question and the reports of the commissions thereunder were constitutional and valid and that the petition should, therefore, be dismissed (see rescript and final order, p. 20 of record; opinion, pp. 24–28 of record).

There are seventeen (17) assignments of error, as follows:

ASSIGNMENTS OF ERROR.

1. The Court erred in deciding that those parts of Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904 which provide that the city of Boston shall be divided into districts of two classes and that no building shall be erected to a height of more than 125 feet above the grade of the street in districts of one class and that no building shall be erected to a height of more than 80 feet above the grade of the street in districts of the other class are not in violation of the Constitution of the United States.

2. The Court erred in deciding that those parts of Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by the provisions of Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, whereby it is provided that the city of Boston shall be divided into districts of two classes to be designated Districts A and B, and to be determined in such manner that Districts A shall comprise those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes and Districts B shall comprise those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial, and whereby there is established in Districts A a limitation in the height to which any buildings may be there erected of 125 feet and in Districts B a varying limit in height of from 80 feet to 100 feet, the height between said limits to be determined in accordance with rules to be fixed by a commission as therein provided, are not in violation of the Constitution of the United States.

3. The Court erred in deciding that said Legislature could limit the height of any building to be erected upon the peti-

tioner's land to 100 feet, without making provision for compensation to the petitioner on account of such limitation.

4. The Court erred in deciding that said Legislature could limit the height of any building to be erected upon the petitioner's land to a height less than 124 feet 6 inches, the height stated in his application for a permit to build, to compel the issuance of which this action was originally brought, without making provision for compensation to the petitioner on account of such limitation.

5. The Court erred in deciding that said Legislature could place any limitation upon the height to which any building could be erected upon the petitioner's land, without making provision for compensation to the petitioner on account of such limitation.

6. The Court erred in deciding that said Legislature could establish, over the whole or any part of the territory comprised within the city of Boston, any limitation of the height to which any building might be there erected, lower than the height called for by the petitioner's application for a permit to build, without providing compensation on account of such limitation to the owners of the premises affected thereby.

7. The Court erred in deciding that said Legislature could provide, either directly or indirectly, that the height of any building to be erected on the petitioner's land should be limited to a height less than that called for by the petitioner's application for a permit to build, while permitting the erection of buildings to said height or to a greater height in other parts of said city, without providing compensation to the petitioner on account of such difference in the height permitted.

8. The Court erred in deciding that said Legislature could provide that a limit of height should be imposed upon buildings to be erected in certain parts or districts of the city of Boston, lower than was imposed upon buildings to be erected in other parts or districts of said city, without providing

compensation to the owners of premises affected by such lower limitation on account of such difference in the height permitted.

9. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit the height of buildings to 125 feet above the grade of the street in those parts or districts of the city of Boston in which all or the greater part of the buildings situate therein were at the time of such division into districts used for business or commercial purposes, and could impose a lower limit, to wit, from 80 to 100 feet, in other parts of said city of Boston, including the premises of the petitioner.

10. The Court erred in deciding that said Legislature could provide that the city of Boston should be divided into districts of two classes and a limitation of height placed upon buildings in districts of one class different in amount from the limitation placed upon buildings in districts of the other class.

11. The Court erred in deciding that said Legislature, either directly or through any commission, could, without providing compensation therefor, prohibit the erection of any building to the height called for by your petitioner's application for a permit to build, or to a height greater than 100 feet, in certain parts of the city of Boston, to wit, upon all premises in the greater portion of said Districts B, while permitting the erection of buildings to the said height or to the height of 125 feet upon other premises in said Districts B, provided said premises lie within 50 feet from the boundary line separating said Districts B from any of said Districts A, and provided said boundary line divides said premises from other adjoining premises both owned by the same person or persons.

12. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit or restrict the height of buildings generally in any portion or

portions of said city of Boston, at the same time excepting from the operation of such limitation or restriction grain or coal elevators and sugar refineries.

13. The Court erred in deciding that said Legislature could, without providing compensation therefor, limit the height of buildings to 100 feet in certain parts of the city of Boston, to wit, those parts or districts in which all or the greater part of the buildings situate therein were at the time of the determination thereof used for residential purposes or for purposes not business or commercial, without imposing a similar and equal limitation in any other city or place in said Commonwealth.

14. The Court erred in deciding that said Legislature could, without providing compensation therefor, impose a lower limit of height upon buildings in certain portions of the city of Boston than was imposed in any other city or in any other place in said Commonwealth.

15. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, is not in violation of the Constitution of the United States.

16. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, is not in violation of the 14th Amendment of the Constitution of the United States.

17. The Court erred in deciding that Chapter 333 of the Acts of the Legislature of Massachusetts for the year 1904, as modified by Chapter 383 of the Acts of the Legislature of Massachusetts for the year 1905, does not purport to authorize any taking of property without due process of law or deny to any person the equal protection of the laws within the meaning of the 14th Amendment of the Constitution of the United States.

The essential contentions of the plaintiff in error are that said Statutes unreasonably infringe upon his constitutional rights:—

(1) As to taking of property without compensation..
(2) As to denial of equal protection of the laws.

A general law applicable to every city of the Commonwealth has been in force for many years, limiting the height of all buildings to one hundred twenty-five (125) feet above the grade of the street (Acts of 1891, Chapter 355). **The plaintiff in error does not attack the validity of that general law in any respect, but concedes that it is constitutional and valid.** This argument is directed merely against the Statutes above set out, which provide for a much lower limit in certain parts of the City of Boston, which parts are to be designated by a Commission.

The plaintiff in error contends that the general restriction of height as low as eighty (80) or one hundred (100) feet over any substantial portion of the City is an unreasonable infringement upon rights of property, and that the application of those limits to Districts "B," which comprise the greater part of the city of Boston, leaving the general one hundred twenty-five (125) foot limit in force in those portions which the Commission should designate, is an unreasonable and arbitrary denial of equal rights to the plaintiff in error and others in like situation.

ARGUMENT.

I.

INTRODUCTORY.—THE QUESTION INVOLVED.

The constitutionality of the Statutes in question and the reports of the commissions thereunder obviously depend upon the extent of the *police power* of the State. The exercise of the police power in the nature of things frequently involves regulations of personal conduct and regulations of the use of property, which, if not justified under the police power, would be invasions of the constitutional rights of the citizens, and, therefore, would be unlawful invasions of his liberty or would require compensation in case of property in order to make them lawful.

This power, as is universally conceded, may be exercised by the Legislature for *certain purposes*, as, for instance, the protection of the public safety, public health, public morals, and public order, even though such measures may regulate and affect personal and property rights to a limited extent.

The precise limitations or the precise sphere of purposes which will warrant the exercise of the police power have never been clearly defined. Undoubtedly, public health, public safety, public morals, and public order, are proper purposes for its exercise. The "general welfare," "public good," and other similar indefinite expressions have been sometimes used as stating purposes which may be properly contemplated in the exercise of this power.

It is equally well recognized that not all beneficent purposes are within the scope of the police power. It would not be contended, for instance, that religious worship could be made compulsory, and it is generally conceded that pri-

vate morals are for the most part free from the control of the Legislature, except as they may affect the well-being of the State. The gratification of the *æsthetic* sense has generally been held not a proper purpose for the exercise of the police power (see pp. 21, 22, *infra*).

If, with regard to any given Statute enacted by the Legislature ostensibly under the police power, it be admitted that the purpose to be accomplished was one for which the police power may lawfully be exercised, there remains the question, *To what extent can personal or property rights be invaded* to accomplish the purpose in view?

Whatever the early doctrines, it has long been settled that the Fourteenth Amendment to the Constitution, although it did not take away the police power of the States in the sense of limiting the subjects upon which the police power may be exercised, *Johnes* v. *Brim*, 165 U. S. 180, 182; or in the sense of preventing *all* taking or regulation of property or *all* inequalities, did nevertheless place in the Federal Constitution limitations upon the police power of the States similar to the limitations which had previously existed by virtue of similar provisions in the State Constitutions

> Cooley on Const. Lim. (7th Ed.) p. 418.
> *Holden* v. *Hardy*, 169 U. S., 366, 382.

It is clear, on the one hand, that the Legislature has a large discretion as to when the necessity has arisen requiring protective legislation, and it is clear, on the other hand, that the Court will set aside a Statute when, in the judgment of the Court, it is clearly an unreasonable invasion of private right, in view of the purpose for which it is enacted.

This conflict which arises in any case where the exercise of the police power affects personal liberty or the rights of property, a conflict between the unquestioned right of a sovereign State to protect the welfare of its citizens, on the

one hand, and the rights of personal liberty and of private property secured to every citizen by the Constitution, on the other hand, has given rise to endless litigation.

Each case as it has arisen has necessarily been decided upon its own particular merits. It is true that general rules have been enunciated by the Court and the principle has been invariably laid down that, if the Statute in question invades private rights of person or property, it must, in order to be valid, be *reasonable*, in view of the purpose for which it is enacted, and, if it involves any form of classification, such classification, under the requirement of equal protection of the laws, must be *reasonable* and not arbitrary with reference to the end in view.

The plaintiff in error contends that the Acts in question, both in their essence and as they are applied through the action of the commission as indicated in their reports (pp. 10–18 of record), are in violation of both these rights.

II.

THE PURPOSES OF THE ACTS ARE NOT SUCH AS JUSTIFY THE EXERCISE OF THE POLICE POWER.

The first point in the argument of the plaintiff in error is that the *purpose* of these Acts is not within the sphere of purposes for which the police power may lawfully be exercised. Assuming, for the purposes of this part of the argument, what will be taken up more particularly below, viz., that these acts infringe upon what would be the constitutional rights of the individual as to person and property, were it not for the police power, it is submitted that the purpose for which these Statutes were enacted is not such as to justify the exercise of that power, and, for this reason alone, the Acts are unconstitutional.

There are three (3) purposes which it is conceivable a Legislature might have in view in enacting such Statutes as the present, viz., (1) public health, (2) safety from fire, and (3) the *æsthetic* purpose of beautifying the city.

(*A*) THE COURT WILL LOOK TO THE REAL PURPOSE OF THE STATUTE.

In *Watertown* v. *Mayo*, 109 Mass. 315, 319, the Court said:

> "The law will not allow rights of property to be invaded under the guise of a police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen."

In *Austin* v. *Murray*, 16 Pick. 121, 126, the Court said:

> "The law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation."

In *State* v. *Redmon*, 134 Wis. 89, 107, the Court said:

> "As it is a judicial function to define the proper objects for the exercise of police power, it must be to decide as to any enactment, whether it really relates to a legitimate object, or, under the guise of doing so, violates rights of person or property."

See also:

Mugler v. *Kansas*, 123 U. S. 623, 661.
Brimmer v. *Rebman*, 138 U. S. 78, 82.
Yick Wo v. *Hopkins*, 118 U. S. 356.
Soon Hing v. *Crowley*, 113 U. S. 703, 710.
People v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 63.

Henderson v. *Mayor of N. Y.*, 92 U. S. 259.
Cal. Reduction Co. v. *Sanitary Wks.*, 199 U. S. 306.
Health Dept. v. *Rector*, 145 N. Y. 32, 40.
Matter of Jacobs, 98 N. Y. 98, 110.
Farist Steel Co. v. *Bridgeport*, 60 Conn. 278, 292.
Priewe v. *Wis., etc., Imp. Co.*, 103 Wis. 537, 549.

And, in determining what is the real purpose of the Statute, the Court will consider *the history of the times and the circumstances leading up to its enactment.*

In *Holy Trinity Church* v. *United States*, 143 U. S. 457, Mr. Justice Brewer said, p. 463:

> "Another guide to the meaning of a statute is found in the evil it is designed to remedy; and for this the Court properly looks at contemporaneous events, the situation as it existed and as it was pressed upon the attention of the legislative body."

The purpose may also be inferred from *the terms of the Act itself.*

In *Lochner* v. *New York*, 198 U. S. 45, the Court said (p. 64):

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barber*, 136

U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78. The Court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U. S. 356."

See also:

Talbot v. *Hudson*, 16 Gray, 417, 420.
Simpson v. Story, 145 Mass. 497, 498.
Pollock v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 558, *et seq.*
Farist Steel Co v. *Bridgeport*, 60 Conn. 278.

(B) The Real Purpose Was Æsthetic.

An examination of the circumstances under which these Acts were passed, of contemporaneous Statutes and contemporaneous litigation, tend to the conclusion that they were aimed not at any dangers to the public health, safety, morals, or well-being, but that they were designed purely for purposes which may be called *æsthetic*, to preserve architectural symmetry and regular sky-lines.

The first Act was passed in the legislative session of 1903–1904, very shortly after the decisions by the Supreme Judicial Court of Massachusetts and by this Court sustained the Statutes which limited the height of buildings in the vicinity of Copley Square and upon Beacon Hill as lawful exercises of the power of eminent domain.

Attorney-General v. *Williams*, 174 Mass. 476 (decided Oct. 30, 1899).
Parker v. *Commonwealth*, 178 Mass. 199 (decided March 1, 1901).
Attorney-General v. *Williams*, 178 Mass. 330 (decided March 13, 1901).
Williams v. *Parker*, 188 U. S. 491 (decided Feb. 23, 1903).

At that time the case of *Commonwealth* v. *Boston Advertising Co.*, 188 Mass. 348, holding that the police power could not be exercised for æsthetic purposes, had not been decided.

It appears from the decision of the Massachusetts Court in *Parker* v. *Commonwealth*, supra (pp. 203, 204), that it was argued before the Massachusetts Court by the Attorney-General in that case that the police power *could* be exercised for such purpose.

The petition to the House of Representatives introducing the bill which later, with no substantial changes, became Statute 1904, Chapter 333, represented

> "that there is urgent need of legislation to protect the residential section of the city from injury by buildings of excessive height,"

and prayed for the enactment of legislation

> "to perfect the Statute now limiting the height of buildings so that it shall provide for a lesser height in the residential part of the city than in the business portions."

It is difficult to see how such an Act can be considered to have any reasonable relation to the public health or safety. Other metropolitan centres of population have no such incisive limitation upon height of *all* buildings. We believe there is no case where a general limit of height has been fixed for *all* buildings of less than one hundred and twenty-five (125) feet. In fact buildings are erected to heights greatly exceeding one hundred and twenty-five feet, and there is nothing to show that either the public health or the public safety is menaced by so doing, provided buildings so erected are built in compliance with general building regulations in the matter of construction, ventilation, light, etc.

The fact that the Statute requires a lower limit in the residential parts of the city than it does in the business sections

is inconsistent with the idea that it is designed as a measure for protection against fire. It cannot be any more difficult to contend with fire on Dartmouth Street than on Washington Street. In fact, owing to the crowded conditions and narrow streets in the business section of the town, it would seem that the reverse is true. As a measure of safety, therefore, the Statute is inconsistent with itself.

And, if the Legislature were in reality seeking to protect the community against fire, it is fair to assume that it would direct its attention to securing strong, durable, and fireproof construction, compelling builders of high buildings to build of steel, concrete, etc.,—not an outer shell filled with wood inside, but of non-combustible material throughout. This kind of protection against fire has been found effective in other cities.

If the purpose were in fact for protection against fire or against danger to the public health, it is hardly believable that the most congested population of the city, *i.e.*, the North End, so called, would be included in District "A,"—the "business or commercial" district.*

Again, if the purpose of the Statutes is to protect public health or safety, it is difficult to see why there is any need of any regulations determining to what height buildings could be erected between eighty and one hundred feet (St. of 1905). Of course, the general regulations as to methods of construction already in force must necessarily be complied with in any event; and, in view of this fact, the regulations to be made by the Commission as to when the height might exceed eighty feet must necessarily, it would seem, have to do with the width of the street, the width of the front of the building on the street, and, in general, the appearance of the building.

Such, in fact, is the nature of the conditions which the

*To the effect that the Court will take judicial notice of the various districts of the city and of the lines of division, see pp. 45–47, *infra*.

Commission made (pp. 17, 18, of record), and this must have been contemplated by the Legislature. Not a single one of the conditions imposed by the Commission under this section of the Statute has to do with materials or methods of construction, ventilation, means of egress, or any circumstances or features relating in any way to the preservation of health or safety from fire.

No declaration is to be found in either Statute as to what is its purpose. Both are described in their titles merely as Acts "relative to the height of buildings in the city of Boston."

It is submitted that where the constitutional rights are attempted to be invaded to the extent here involved it should appear clearly what public end requires such invasion. The purpose should be made clear and not left to speculation.

It is submitted that the facts and circumstances above set out clearly spell an *æsthetic* purpose.

(C) The Police Power cannot Properly be exercised for an Æsthetic Purpose.

It is now believed to be settled that, although property may be taken by right of *eminent domain* for æsthetic purposes,—

Higginson v. *Nahant*, 11 Allen, 530,
Attorney-General v. *Williams*, 174 Mass. 476,

still that purpose is not sufficient to warrant the exercise of the *police power* in such manner as to interfere with the use of property.

Commonwealth v. *Boston Ad. Co.*, 188 Mass. 348.
St Louis v. *Hill*, 116 Mo. 527.
St. Louis v. *Dorr*, 145 Mo. 466.
People v. *Green*, 85 App. Div. (N. Y.) 400.

Bostock v. *Sams*, 95 Md. 400.
Posting Sign Co. v. *Atlantic City*, 71 N. J. L. 72.
Passaic v. *Patterson Bill Post Co.*, 72 N. J. L. 285.
Chicago v. *Gunning System*, 214 Ill. 628.
Article on "Public Æsthetics," by Wilbur Larremore, in *Harvard Law Review*, November, 1906, pp. 42, 43.

III.

THE INFRINGEMENT UPON RIGHTS OF PROPERTY INVOLVED IN THESE ACTS IS UNREASONABLE.

No definite rule has been established as to what constitutes reasonableness.

The Court has not and does not assume a general power of review of matters of legislative discretion. It has been said by the Court in many cases that it is not for the Court to set aside an Act of the Legislature, because the judgment of the Court differs from that of the Legislature as to the expediency of a legislative Act; but it follows from the fact that they do undertake to declare Statutes unconstitutional, that *the Courts assume a standard of reasonableness which is outside of and superior to the legislative discretion.*

We come then to the question of what is the standard of reasonableness which the Courts adopt in reviewing a legislative enactment which is claimed to be in violation of constitutional rights.

(A) The Principle of Reasonableness is a Principle of Proportionateness.

It is clear that "reasonable," as used by the Courts in this connection, does not mean merely expedient nor merely

well adapted in the judgment of the Court to the end in view. The adoption of such a standard would merely mean a general power of review by the Courts of the legislative discretion.

It is submitted, also, that it is clear from the history of the decisions on the police power that the Court does not require that the Statute in question be found to be absurd or plainly a usurpation of legislative power. This would be adopting a principle far from that of reasonableness, and would be in effect surrendering to the Legislature all control over this class of legislative enactments.

The *logical result*, and that which the Courts have adopted, is substantially the principle that the legislative Acts under the police power, when affecting private rights, must have

> "some fair and reasonable relation of means to end which Courts can see and admit the force of,"

and that the infringement of rights must bear a reasonable relation to the public necessity, or, in other words, the measure *must be proportionate* to the end in view. It is only reasonable to suppose that an urgent public need might justify a more serious interference with the citizen or his property than would a need less urgent.

This standard of proportionateness is also the *natural result from the character of the question* with which the Court has to deal. It is a question of harmonizing the two (2) conflicting rights,—the right of the State in the protection of public safety, health, morals, and order, and the constitutional rights of the individuals,—a question of balancing public necessities against the rights of person and property secured by the Constitution.

There has been much vagueness in the *authorities* as to what is meant by "reasonableness." Both the Courts and the text-writers have for the most part been contented with

the statement merely that a law to be valid must be reasonable. It is believed, however, that these cases in which the principle has been most carefully and accurately stated unite in indicating this standard of *proportionateness*, the "fair and reasonable relation of means to end," and that they require the infringement of rights to be not more than public necessity reasonably demands.

It must be recognized that the police power may be called into action for the protection of the public,—"*by preventing in advance threatened and probable injury.*"

Watertown v. *Mayo*, 109 Mass. 315, 319.

But the *mere possibility of danger is not sufficient* to justify burdensome legislation on the ground of police power.

In *Ex parte* Whitwell, 98 Cal. 73, there was drawn in question an ordinance of the Board of Supervisors of a county providing that no hospital or place for the care of insane persons, or persons affected with inebriety or other nervous diseases, should be maintained, unless the buildings should be constructed of brick or iron, or iron and stone, or unless the building and grounds to which the insane persons are allowed access should be surrounded by a wall at least twelve feet high, etc. The Court held the ordinance void as not being proper exercise of the police power, and said (per De Hoven, J., p. 82):—

> "Legislation of this character, which imposes an onerous burden of expense upon a lawful and highly meritorious business, cannot be justified by the mere possibility of the danger which it ostensibly seeks to avert. *It must rest upon the fact that experience has demonstrated that such danger, in the absence of such legislative regulation, is one which may reasonably be anticipated as the probable result* of conducting such business, *notwithstanding the exercise of ordinary care to prevent it.*" (Italics ours.)

In *State* v. *Speyer*, 67 Vt. 502, where a general regulation had been made by a Board of Health that no one should maintain a pig-pen within one hundred feet of a well or spring used for drinking purposes or within one hundred feet of any street or inhabited house, the Court, in holding such regulation unreasonable, said (per Start, J., p. 507):

> "It reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property. It is *founded on fear and apprehension of a remote possible danger to the public health*, and not upon its existence or upon reasonable grounds to apprehend that any considerable portion of the pig-pens affected by it endangers or will endanger public health." (Italics ours.)

In *Commonwealth* v. *Tewksbury*, 11 Met. 55, 57, Chief Justice Shaw says:

> "All property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others or to destroy or greatly impair the public rights and interests of the community. . . . This is undoubtedly a high power, and is to be exercised with the strictest circumspection and with the most sacred regard to the right of private property and only in cases amounting to an *obvious public exigency*." (Italics ours.)

In Cooley on Constitutional Limitations, 7th Ed., p. 878, the learned author avers the propriety of the exercise of the police power in case of "*some controlling public necessity*." (Italics ours.)

See also:

Miller v. *Horton*, 152 Mass. 540, 547.
State v. *Ashbrook*, 154 Mo. 375.

Furthermore, in cases where it is admitted that an evil exists which ought to be remedied, *the means adopted by the Legislature must tend in some clear way to remedy the evil in question.*

In *People* v. *Gillson*, 109 N. Y. 389, 403, it was held that a Statute prohibiting the sale or disposal of any article of food, or any offer or attempt to do so, upon any representation, advertisement, notice, or inducement, that anything, other than that which is specifically stated to be the subject of the sale, is to be delivered as a gift, prize, premium, or reward to the purchaser, was unconstitutional and void. It was argued that the Act was valid as a health law and to prevent dealing in impure, unwholesome, and adulterated food. The Court said (p. 403):

> "There must be some fair and reasonable relation of means to end which Courts can see and admit the force of. We think it clear there is no such relation here."

In *Health Department* v. *Rector*, 145 N. Y. 32, holding valid under the police power, as a measure for the public health and as a precaution against fire, a New York Statute requiring owners of tenement houses previously erected in the City of New York, whenever they should be directed so to do by the Board of Health, to furnish said houses with water in sufficient quantity at one or more places on each floor occupied or to be occupied by one or more families, the Court said (p. 40) that such Statute to be valid must

> "tend in some plain and appreciable manner towards the accomplishment of some of the objects for which the legislature may use this power."

In Matter of Jacobs, 98 N. Y. 98, 110, this doctrine is very clearly enunciated as follows:

> "Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety; and, *while its measures are calculated, intended, convenient, and appropriate to accomplish these ends,* the exercise of its discretion is not subject to review by the courts, but they must have some relation to these ends. Under the mere guise of police regulations personal rights and private property cannot be arbitrarily invaded and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health and thereby destroys or takes away the property of a citizen or interferes with his personal liberty, then *it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate* to promote the public health. It matters not that the legislature may in the title to the act or in its body declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared, and enforce the supreme law." (Italics ours.)

In *Mugler* v. *Kansas*, 123 U. S. 623, 661, Mr. Justice Harlan said:—

> "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

See also:

Minnesota v. *Barber*, 136 U. S. 313, 320.
Jacobson v. *Mass.*, 197 U. S. 11, 28, 31.

It is in every case *a question of proportion and degree* with reference to the end in view.

In *Chicago, etc., Railway* v. *Drainage Comrs.*, 200 U. S. 561, 593, Mr. Justice Harlan says:

> "If the means employed have no real substantial relation to public objects which government can accomplish; *if they are arbitrary and unreasonable beyond the necessities of the case,* the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. (Italics ours.)

In *Railway Co.* v. *Husen*, 95 U. S. 465, the question related to a Statute of Missouri which prohibited the bringing into or through Missouri of any Texan, Mexican, or Indian cattle between March 1 and November 1 in each year. The Court said (p. 472):—

> "While for the purpose of self-protection it may establish quarantine and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection."

And the Court unanimously held the Statute unconstitutional, as going beyond the necessities of the case.

In *Sawyer* v. *Davis*, 136 Mass. 239, a Statute providing that manufacturers might ring bells and use whistles and gongs of certain size and weight in such manner and at such hours as the Board of Aldermen of cities and Selectmen of towns might designate, was held to be constitutional, although otherwise it would have been a private nuisance. The Court said (per C. Allen, J., p. 243):

> "Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power with a view to the general good. Grave ones will fall within the constitutional limitation that the Legislature is only authorized to pass reasonable laws. The line of distinction cannot be so laid down as to furnish a rule for the settlement of all cases in advance. . . . Courts, however must

determine the rights of parties in particular cases as they arise."

In *Rideout* v. *Knox*, 148 Mass. 368, sustaining the Massachusetts Statute declaring spite fences more than six feet high a private nuisance, the Court said (per Holmes, J., p. 372):

> "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate difference of degree is one of the distinctions by which the right of the Legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain."

In *Toledo, etc., Railway* v. *Jacksonville*, 67 Ill. 37, the Court set aside an ordinance of the city requiring the Railway Company to keep a flagman by day and a red light by night at every street crossing. The Court treated the question as if the city was entitled to exercise all the powers of the State Legislature. The Court clearly considered the relation between the burden imposed upon the Railway Company and the danger which might require such burden, and found the burden disproportionate. The doctrine of proportionateness is clearly the basis of the decision.

In *Bent* v. *Emery*, 173 Mass. 495, 496, holding that the dredging of flats by the Board of Harbor and Land Commissioners of Massachusetts, which resulted in the sinking of the surface of the flats permanently under water, was such a taking of property as to entitle the owner to compensation, the Court said, referring to those infringements upon property rights which are permissible in the exercise of the police power (per Holmes, J.):

> "The question is one of degree and sooner or later we reach a point at which the Constitution applies and forbids physical appropriation and legal restrictions alike, unless they are paid for."

In *Martin* v. *Dist. of Columbia*, 205 U. S. 135, a case involving the constitutionality of certain assessments for local improvements, Mr. Justice Holmes used the following illustration (p. 139):—

> "Constitutional rights, like others, are matters of degree. To illustrate: Under the police power in its strict sense a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain."

The attention of the Court is respectfully requested to the learned discussion in the recent case of *State* v. *Redmon*, 134 Wis. 89, especially at pages 110 *et seq.*, in which it is believed the Court squarely sets forth the doctrine here contended for. The case held that a Wisconsin Statute, which required that the upper berth in a sleeping car when not actually occupied, should be kept closed upon request of the occupant of the lower berth, was unconstitutional. The Court (p. 112) adopted the following statement from Freund on Police Power, Section 143, as a correct statement of the questions involved in passing upon the validity of a Statute purporting to be a health or safety measure, viz.:

> "Does a danger exist? Is it of sufficient magnitude? Does it concern the public? Does the proposed measure tend to remove it? Is the restraint or requirement in proportion to the danger? Is it possible to secure the object sought without impairing essential rights and principles?"

See also on the principle of proportionateness Freund, Police Power, Section 63.

(B.) The Extent of the Infringement upon Property Rights.

It will not be disputed that any regulation which deprives any person of a profitable use of his property constitutes a taking of property, and that the owner is entitled under the Constitution to compensation, unless the invasion of rights is so slight as to permit the regulation to be justified under the police power.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166, 179.
United States v. *Lynah*, 188 U. S. 445.
Sweet v. *Rechel*, 159 U. S. 380, 399.
Eaton v. *Boston, etc., R.R.*, 51 N. H. 504.
Bent v. *Emery*, 173 Mass. 495.
Grand Rapids v. *Jarvis*, 30 Mich. 308, 320, 321.
Matter of Jacobs, 98 N. Y. 98, 105, 106.
Edwards v. *Bruorton*, 184 Mass. 529, 532, 533.
Holmes, J., in *Miller* v. *Horton*, 152 Mass. 540, 547.

The Legislature of Massachusetts in the previous Statutes limiting the height of buildings about Copley Square in Boston to the height of *ninety* feet, and on Beacon Hill, in the vicinity of the State House, in Boston, to a height of *seventy* feet, recognized that such a regulation involved a taking of property,

St. 1898, Ch. 452; St. 1899, Ch. 457,

and the Supreme Court of Massachusetts, in the decisions sustaining those Statutes as exercises of the power of eminent domain, likewise recognized this fact.

Attorney-General v. *Williams*, 174 Mass. 476.
Parker v. *Commonwealth*, 178 Mass. 199.
Attorney-General v. *Williams*, 178 Mass. 330.

The value of the use of his property, of which the owner is deprived by being denied the right to build above the limit fixed, is much greater than would be the case if he were deprived of all use of the same, as by flooding with water, if the land were in a remote locality.

Cf. *Mugler* v. *Kansas*, 123 U. S. at 668.

The Statutes in question involve that kind of regulation which Mr. Freund, in his work on Police Power, calls "confiscatory regulation," where he says (Section 517):

> "The absolute destruction or abrogation of property rights—*including confiscatory regulation leaving no reasonable profit to the owner*—is an extreme exercise of the police power. Where it is proposed to exercise such an authority, the constitutional right of private property must be weighed against the demands of the public welfare, and it is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation."

This difference is well illustrated by contrasting the laws fixing fire limits or the general building laws regulating the kind of materials to be used, the thickness of walls, the nature of foundations, the arrangement of stairways to permit exit in case of fire, etc., with the Statutes now in question.

Such ordinary building regulations do not even substantially diminish the value of property, whereas the Statutes here in question involve the practical prohibition of the owners from making *any use whatever* of their property above a certain number of feet from the ground, and this amounts virtually to a destruction of millions of dollars worth of property in the city of Boston.

Mr. Justice Holmes said in *Parker* v. *Commonwealth*, 178 Mass. 199, at 205,—

> "The right to build the seventy-first foot from the ground is just as much a right under the Constitution as the right to build the sixty-ninth or the first. It may be of less importance, but it is the same in kind."

Inasmuch as it appears from the record (p. 2) that the frontage of the premises of the plaintiff in error on Arlington Street is only forty-seven feet, it follows that, under the regulations established by the commission (p. 18 of record), no building may be erected upon said premises to a height greater than ninety-four feet (or twice its width on Arlington Street).

If it should be the fact that any private restriction were in existence requiring any building on said premises to be set back a given distance from Marborough Street, it would follow under the regulation above referred to, that the limit of height permitted to the plaintiff in error would be still less.

(C) The Infringement is Disproportionate to any Public Necessity or End.

As has been argued heretofore in this brief (pp. 18-21 *supra*), it is submitted that the real purpose of the Legislature in enacting these Statutes was an *æsthetic* purpose. If this is true, then it is submitted upon the authorities before cited that the Statutes should be held unconstitutional on this ground alone.

But, if it be assumed, for the purposes of argument, that the Statutes were enacted for some object properly within the scope of the police power, it is submitted that they involve an invasion of private rights which is entirely disproportionate to any of the objects which the Legislature might properly have had in view.

The only objects, aside from the æsthetic, which it is at all conceivable might have been in view of the Legislature,

are the *public health* or the *public safety*, and it is confidently believed that no public necessity existed for either of those objects sufficient to justify the measure in question.

The experience of other cities with buildings much higher than any one has yet desired to build in Boston, and much higher than the limits fixed by these Statutes, goes very strongly to show that the danger of injury to health and the danger from fire where tall buildings are properly constructed are very slight.

The questions of the existence of a danger demanding a remedy through the action of the police power must be determined with reference to existing conditions and the probability that, if such action is not taken, the danger will become a reality.

It is not disputed, as was stated by Mr. Chief Justice Knowlton in delivering the opinion of the Massachusetts Court in this case (193 Mass. 364, at 373), that

> "The erection of very high buildings in cities, especially upon narrow streets, may be carried so far as materially to exclude sunshine, light, and air and thus to affect the public health. It may also increase the danger to persons and property from fire and be a subject for legislation on that ground."

But this danger, if it existed, had been provided for long before the enactment of the Statutes here in question. The Legislature of Massachusetts enacted a Statute in 1891 (Acts of 1891, Chapter 355) which reads as follows:

> "No building more than one hundred and twenty-five feet in height above the grade of the street shall hereafter be erected in any city: provided, however, that this restriction shall not apply to grain or coal elevators, or sugar refineries, nor to steeples, domes, towers or cupolas erected strictly for ornamental purposes of fireproof material on buildings of the above height or less."

This Statute has been continuously in force since its enactment and is to be found now substantially unchanged in the Revised Laws of Massachusetts, Chapter 26, Section 37.

The real question of public import involved in this case is, what necessity existed for the additional restrictions which are comprised in these Statutes of 1903 and 1904 which are in issue here.

The plaintiff in error has no objection to the one hundred twenty-five (125) foot limitation, provided only it be general.

With that Statute in force, there was no necessity for any more rigid limitations and there was no danger which demanded the sacrifice of constitutional rights to the extent which has been attempted by the Massachusetts Legislature. Such limitation as has been here imposed, while it may have a tendency to the gratification of the æsthetic taste by keeping buildings "of excessive height" (or, in other words; substantially higher than those now standing) out of certain sections which are now considered very desirable for residential purposes, cannot have any reasonable relation to public health or public safety.

These are not Statutes which are aimed merely at prescribing a lower limit for buildings used as residences or dwellings and a higher limit for business buildings. They apply to all buildings in the designated Districts for whatever purposes used (with minor exceptions).

Again, these regulations are disproportionate, particularly as regards the purpose of public safety (and this is the only element to be considered in the case of buildings used for business purposes), in that this object could be attained much more simply and without detracting from the value of any one's property by the enactment of laws requiring fireproof construction, not that form of construction which is *called* "fireproof," but construction of steel, concrete, stone, etc., which is in *reality* fireproof, and by regulations as to means of egress, etc. These are the forms of regulation

which are generally adopted, and there is no reason to doubt that they are effective. See, for instance,

Ash, Building Code of New York City, Parts VII, XX.

Further, the Acts are disproportionate, as regards public health, because that object could be much more easily attained and with much less burden upon the owners of property, by regulations as to ventilation, light, etc. Again, this is the kind of regulation commonly in use.

There is no case in the books where Statutes infringing so seriously upon property as those now in question and regulating the use of property to such a burdensome extent have been sustained by the Courts for any purpose.

In *Lochner* v. *New York*, 198 U. S. 45, holding unconstitutional a Statute of New York providing that no employee should be required or permitted to work in bakeries or confectionery establishments more than sixty hours per week, or ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week, the Court, while conceding that there might be a certain amount of unhealthiness about the trade of a baker (p. 59), held that it was not unhealthy to that degree which would authorize the Legislature to interfere with the right of contract. The following language of Mr. Justice Peckham, delivering the opinion of the Court, is especially significant upon the question of the right of the Legislature to impose such an incisive limitation upon the height of buildings so far as purposes of public health are concerned (pp. 59–61):

> "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? . . . No trade, no occupation, no

mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day, would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk in such offices is therefore unhealthy, and the legislature in its paternal wisdom must, therefore, have the right to legislate on the subject of and to limit the hours for such labor, and if it exercises that power and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts. . . . If this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. . . . Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise

> of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case the individuals, whose rights are thus made the subject of legislative interference, are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the State has no power to limit their right as proposed in this statute."

It is submitted, on the one hand, that there is no possible danger, existing or threatened, to the public health in the present case any greater than that which was under consideration by Mr. Justice Peckham in the remarks above quoted, and, on the other hand, that the infringement upon the constitutional rights of the individual is much greater in this case than was the supposed interference with hours of bankers, lawyers, etc., in that.

In *Parker* v. *Commonwealth*, 178 Mass. 199, where it was contended by the Attorney-General that the restriction upon the height of buildings upon Beacon Hill in Boston might be sustained to some extent under the police power and compensation awarded for the rest, Mr. Justice Holmes said (pp. 204, 205):

> "If it should be suggested that the restriction might be sustained under the police power beyond a certain number of feet from the ground and compensation allowed for the restriction between that height and seventy feet, apart from the difficulty of fixing a constitutional limit by feet and inches, which might not be insuperable, see *Quinn* v. *New York, New Haven & Hartford Railroad*, 175 Mass. 150, 151, the answer is that *the constitutional difficulty would not grow appreciably less until we reached a point at which the restriction*

became nugatory because it was beyond the height to which any one would wish to build. . . . We are of opinion that the construction adopted by the Attorney General must be rejected, and therefore we do not find it necessary to express an opinion whether a law, in which the Legislature, either with a declaration of purposes such as we have imagined for this act or without it, should give clear expression to its intent to restrict these buildings in the exercise of its police power without payment, would infringe the Constitution. Such a law certainly would present grave difficulties even when approached with all the presumptions that exist in favor of a legislative decision, and with the duty to uphold it unless it was impossible to do so. Compare *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 278, 292, with *Attorney General* v. *Williams*, 174 Mass. 476, 479, 480. See also *Bent* v. *Emery*, 173 Mass. 495. . . . The right to build the seventy-first foot from the ground is just as much a right under the Constitution as the right to build the sixty-ninth or the first. It may be of less importance, but it is the same in kind."

There, it is true, the Court had raised the objection that "a police law could not be limited to this narrow tract," but it would seem that the same difficulty exists in the present case. Districts "B," so called, comprise only a part of the territory of the city and a still smaller part of the territory of the Commonwealth.

And it is submitted this other difficulty of disproportionateness between the remedy and supposed danger is no less real here than it was there,—that it is plainly unreasonable to say that the danger of injury to public health or safety or general well-being is so extreme as to demand a remedy which involves the practical destruction of property to such an extent.

The Court in *Parker* v. *Commonwealth*, supra, referred to the limitation in height of buildings on Beacon Hill to seventy feet as "a luxury, rather than a necessity." The

aim of these Statutes is a still greater luxury. The disproportion between any possible evil and the remedy appears unbearable.

It is to be noted that the English Public Health Act, n providing that houses might be ordered to be set back or forward when the front should be taken down for purposes of rebuilding, provided compensation.

> English Public Health Act, Sec. 155 (cited by Freund on Police Power, Sec. 514, n. 41).

Also, that in Prussia, where a building permit was refused, in order to save the view of a public monument from obstruction, the State, as the owner of the monument, was held liable to make compensation.

> Freund on Police Power, Sec. 181, n. 50 (citing Imperial Court, Jan. 9, 1882, Cruchot, Vol. 26, p. 935).

See also:

> *Janesville* v. *Carpenter*, 77 Wis. 288, 301, 304.
> *Dobbins* v. *Los Angeles*, 195 U. S. 223,
> *Brimmer* v. *Rebman*, 138 U. S. 78.

IV.

THE CLASSIFICATION IS NOT REASONABLE, WITH REFERENCE TO THE OSTENSIBLE OBJECTS OF PUBLIC HEALTH OR PUBLIC SAFETY.

If it be again conceded, for purposes of argument, that the object or purpose of these Acts was within the legitimate sphere of purposes permissible to the police power, yet the classification adopted has no proper relation to either of the possible ostensible objects, but is arbitrary and unreasonable.

(A) The Kind of Classification Permissible under the Police Power.

It is not to be contended that the constitutional provision that

> "no State shall deny to any person within its jurisdiction the equal protection of the laws"

means that all persons are to be treated alike. It contemplates the right of the Legislature to make reasonable classifications, and the protection given by the law is considered equal if all persons within the classes thus established are treated alike under like circumstances and conditions.

Missouri v. *Lewis*, 101 U. S. 22.
Magoun v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293.
Barbier v. *Connolly*, 113 U. S. 27, 31.
Hayes v. *Missouri*, 120 U. S. 68, 71.

But it is well settled that the *classification adopted must be a reasonable one, with reference to the purpose for which the Statute is enacted; it cannot be arbitrary.*

In re *Gulf, etc., Ry.* v. *Ellis*, 165 U. S. 150, 159, 165, the Court, speaking by Mr. Justice Brewer, said:

> "Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. . . . It is apparent that the mere fact of classification is not sufficient to relieve a Statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and it is not a mere arbitrary selection."

This language was approved by the Court in *Connelly* v. *Union Sewer Pipe Company*, 184 U. S. 540, 560.

Such classification is upheld, as was said by this Court in the case of *Atchison, etc., R.R.* v. *Mathews*, 174 U. S. 96, 104, if it

> "proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

And, further, to the point that the *classification must relate to the end in view*, the Court said (p. 105):

> "Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished the same conclusion of unconstitutionality is affirmed."

And in *Heath & Mulligan* v. *Worst*, 207 U. S. 338, the Court said:

> "Classification must have relation to the purpose of the legislation."

It is submitted that, unless the classification be consistent and appropriate to the purpose of the Statute, it is necessarily and in the nature of things arbitrary.

In *Missouri* v. *Lewis*, supra, a Statute of Missouri provided that the St. Louis Court of Appeals should have exclusive jurisdiction in certain classes of cases of all appeals from the Circuit Courts in St. Louis and certain adjoining counties, with a right of appeal from the St. Louis Court of Appeals to the Supreme Court of the State only in cases where the amount in dispute exceeded twenty-five hundred dollars, and in certain other classes of cases, for example, where the construction of the Constitution was involved. As to the other counties in the State the Statute permitted appeals in all cases direct to the Supreme Court.

This Statute was held valid, and the Court said that the requirement of equal protection of the laws was not violated by the existence of a different judicial system in different parts of the State, provided that all persons within the limits of the respective jurisdictions had an equal right in like cases and under like circumstances to resort to the Courts for redress.

This case, however, goes upon the same principle which permits different local regulations in different cities or in different parts of the State. It undoubtedly does not go to the extent of permitting territorial divisions in cases where such division does not bear a reasonable relation to the purpose of the Statute. In fact, discrimination between localities, in the absence of reasonable basis therefor, has been held to be unconstitutional as violating the requirement of the equal protection of the laws. See:

Bessette v. *The People*, 193 Ill. 334.
State v. *Divine*, 98 N. Car. 778.

In *Bessette* v. *The People*, above cited, the Supreme Court of Illinois held unconstitutional an Illinois Statute requir-

ing all horseshoers in cities of over fifty thousand population, and in cities between ten thousand and fifty thousand population which should adopt the Act, to take out licenses as a requisite to carrying on such business. The Court (per Magruder, J., p. 347) said:

> "It is true that a classification of the cities and villages of the State by population as a basis for legislation may be valid, but a classification *cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes.*" (Italics ours.)

And at p. 348 the Court further said that the Act,

> "creates a purely arbitrary classification. There is no reasonable relation between the cities and towns classified in Section 15 (the Section of the Act which provided that the Act should apply as above stated) and the purposes and objects to be attained by the Act in reference to horseshoing."

In *State* v. *Divine*, supra, it was held that a Statute of North Carolina, which made the killing or injuring of cattle or other live stock by a railroad in *certain counties* a misdemeanor and provided that certain officials of such railroad might be indicted for such killing or injury, was unconstitutional, because it applied only to certain counties and not to the whole State.

Thus in territorial classification no less than in classification on any other principle the classification must proceed upon a basis appropriate to the purpose in view.

The essence of the requirement of equal protection is that laws or regulations *must apply equally to property of the same kind and in like circumstances.*

In *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, the Court held invalid certain assessments levied by the State Board

of Equalization in Illinois, on the ground that said assessments were levied by a different and more burdensome method than was adopted in the case of other like corporations for the same year.

In *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, a Statute which classified stock yards on the basis of the amount of live stock handled per day and limited the charges of those handling more than a certain amount of business, was held unconstitutional. The Court said (per Brewer, J., p. 112):

> "Equal protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

See also:

Missouri, Kansas & Texas Ry. v. *May*, 194 U. S. 267, 269.
Barbier v. *Connolly*, 113 U. S. 27, 31.
Watertown v. *Mayo*, 109 Mass. 315, 319.

In *Missouri, Kansas & Texas Ry.* v. *May*, supra, Mr. Justice Holmes (p. 209) stated that the question to be considered in any case arising under the equal protection clause is, whether there is any fair reason for the law which would require with equal force its extension to others whom it leaves untouched.

(*B*) Judicial Notice.

So far as it may be desirable to do so, it is submitted that the Court will take judicial notice of facts of common knowledge, of the location of the lines drawn by the commission, of the situation of various streets, and of the character of the various districts and localities of the city.

As to the facts of common knowledge, it is sufficient to refer to the cases of

Brimmer v. *Rebman*, 138 U. S. 78.
Minnesota v. *Barber*, 136 U. S. 313, 321.
Jacobson v. *Mass.*, 197 U. S. 11,23.
Muller v. *Oregon*, 208 U. S. 412, 421.

In *Siegbert* v. *Stiles*, 39 Wis. 533, the Court took judicial notice that two cities, one in the State and one outside, were separated by a river, and that in winter communication was frequently carried on over the ice.

In The Montello, 11 Wall. 411, the Court took judicial notice of the navigability of the Fox River in Wisconsin, and stated that it had examined geographies and histories of Wisconsin to find out and

> "to render the fiction of the law as to our supposed knowledge . . . a reality."

In *Gardner* v. *Eberhart*, 82 Ill. 316, the Court took judicial notice of the governmental surveys of the public lands and that a quarter section of land consisted of four forties, each with well-defined bounds.

In *Prince* v. *Crocker*, 166 Mass. 347, upon the question of whether the Legislature could authorize the Boston Transit Commission, engaged in the construction of a rapid transit tunnel, to enter upon the Public Garden in Boston, the Court said (p. 364):

> "In determining whether an entry upon the Public Garden is authorized, the Court will take notice of the situation of the streets and squares and public grounds."

The situation and character of the various districts and localities of the city of Boston being matters of common knowledge, of which the Supreme Judicial Court of Massa-

chusetts would and did take notice, it is submitted that this Court is authorized to do likewise. It is clear that this Court upon writ of error takes judicial notice of all matters which were matters of *law* in the State Court. By analogy, therefore, this Court should notice judicially *all* matters not required to be proved as facts in the State Court, including matters of judicial notice. It would seem clear that, within the rule above stated, matters of judicial notice are matters of law.

(C) The Classification Involved in these Statutes is not Reasonable, within the Rules laid down.

It has been argued above (pp. 21, 22) that the æsthetic purpose is not sufficient to justify an encroachment by the Legislature upon the *property rights* of the individual. It is submitted that no further argument is necessary to the effect that the same principle forbids an encroachment for such purpose upon the individual rights of *equality*.

The plaintiff in error contends that the classification attempted in these Statutes is arbitrary and is not considered with a purpose to safeguard either the public health or the public safety.

The special features of the classification attempted are set out below as they are taken up in argument.

(1) *These Statutes are special laws, applying to a single city in the Commonwealth, viz., the city of Boston.*

They impose a varying limitation of from eighty to one hundred feet upon the height of buildings situate in certain sections of the city of Boston,—a limitation which prevails in no other city or place within the Commonwealth.

It is true that reasonable classification of cities may be

made, but, as above shown, it must be based upon some real difference with reference to the purposes of the Act.

Tenement House Department v. *Moeschen*, 179 N. Y. 325.
Watertown v. *Mayo*, 109 Mass. 315.
State v. *Hammer*, 42 N. J. Law, 435, 440.
Bessette v. *People*, 193 Ill. 334 (above referred to).

It is difficult to see what principles or reasons would demand such limitation in so-called residential sections of the city of Boston which would not apply equally in those other cities and towns immediately surrounding the city of Boston and forming with it physically one city.

The city of Boston is the centre of a large metropolitan district. A large number of cities and towns immediately adjoin the city of Boston, and together constitute a continuous section which is more or less thickly populated. Each of these cities and towns has one or more business sections and large residential sections; and the same reasons, if any there are, which demand such an emphatic limitation upon height in the residential sections of Boston, equally demand a like limitation in similar sections of these surrounding cities and towns.

The population of that part of this large territory which is comprised within the legal limits of the city of Boston is considerably less than one-half of the population of the entire metropolitan district. In some cases it is impossible to tell where the division line runs between the city of Boston and the surrounding muncipalities, and in other cases the division is made by the Charles and the Mystic Rivers, and the character of the territory on either side of the rivers is exactly the same. Further, among these surrounding cities and towns it is in most cases impossible to tell where the lines of division between them run.

It is inconceivable that there can be any rational reason or object which demands that buildings in the so-called residential sections of Boston be limited to eighty feet, while the residential sections of these cities and towns require no such limitation.

The plaintiff in error, therefore, from the fact that his property is situated within this narrowly circumscribed district in Boston is deprived of a right to which he would be entitled in Cambridge or Brookline, or anywhere else within this great metropolitan district.

(2) *The classification attempted within the city of Boston itself is not based upon reasonable grounds.*

In Section 1, Chapter 333, of Acts of 1904, the first of the Statutes in question under which the division of the city into districts was made, it is provided that the boundaries of the districts to be established

> "shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are at the time of such determination used for business or commercial purposes shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are at the said time used for residential purposes or for other purposes not business or commercial shall be in the district or districts designated B."

It is submitted, in the first place, that a division based upon this principle is *fundamentally* arbitrary, because, so far at least as the public safety is concerned, such a division is necessarily inconsistent with that object. The dangers from fire arising from the presence of high buildings must be greater in the business section of a city than in the residential sections. The factories and office buildings,

crowded with persons carrying on business pursuits, are found in the business sections. This feature is exaggerated in Boston by reason of the narrow and *crooked* streets and alleys which prevail throughout the business section of Boston, and which are not found to any considerable extent in the residential districts which are designated "B."

If it were conceded that such a division could be fairly and equitably made, yet persons are deprived of certain uses to which they might otherwise put their property merely because it happens to be situated in that part of Boston where the Commission said most of the buildings were used for residential purposes. This is no more to be justified than denying a use of property to one which is conceded to another, merely because the former happens to live in more attractive surroundings.

Furthermore, such principle is bound to be arbitrary in its *application*. Any determination of those parts of a city in which all or the greater part of the buildings are used for business or commercial purposes is bound to be to a certain extent arbitrary. The gradation from a district which is essentially business or commercial to that which is residential is, it is true, in some cases comparatively abrupt, but for the most part it is very gradual, and it is impossible in such cases to draw any line of demarcation which will represent fairly such a distinction as is attempted in this Statute.

Again, there are sections devoted chiefly to business or commercial purposes where all the surrounding vicinity is residential in character, and there are sections devoted chiefly to residential purposes in the midst of a business district.

The record shows (pp. 10–17, inc.) that the orders of the Commission appointed under the Statutes designated *only three districts* as business or commercial. These are large districts, and, as appears from said reports, they comprise:

(1) A certain portion of East Boston.
(2) A certain portion of Charlestown.
(3) A certain portion of Boston proper.

These parts are only separated by certain arms of Boston Harbor. The Commission has, evidently, avoided designating any small districts.

It is apparent, therefore, how unequal and arbitrary is the result reached, even under the present conditions.

Cf. Yick Wo v. *Hopkins*, 118 U. S. 356, 368.

And, inasmuch as the time provided by the Statute within which the orders of the Commission might be revised has long since expired, the division lines as now established must remain unchanged until fifteen years from the date when the Commission's order was recorded with the Registry of Deeds (Sec. 2 of Chapter 333 of the Acts of 1904). Thus all provision or allowance for the extension or expansion of the so-called business or commercial district is distinctly denied, and, in view of the rapidity with which the business district has expanded within recent years, particularly in the direction of the Back Bay and the South End, it seems probable that in much less than the fifteen years limited these lines as at present determined will be, if possible, even more arbitrary than they are now and will have no reference whatever to actual conditions. Great changes have taken place, even since the passage of these Statutes, and the effect of changed conditions in a locality upon restrictions on real estate has been recognized by the Massachusetts Court.

Jackson v. *Stevenson*, 156 Mass. 496,

where it was held that because the nature of the locality had changed the Court would not enforce certain restrictions on real estate.

Such a classification must necessarily have a powerful *economic effect*, designating as it does certain parts of Boston as the business district and providing that for fifteen years that district *shall not expand*. Business establishments, it is true, can be erected in the residential portions, but the effect of the Statutes is undoubtedly to prevent any large business development outside of the districts fixed by the Commission. The property owner has no greater rights in building for business purposes than if he were building a house in which to live.

If any classification of territory for such purpose on the basis of business or commercial, on the one hand, and residential, on the other hand, is to be allowed, the law in order to be fair and equal must be so framed as to be elastic and to meet the changes which are constantly taking place in the various localities in any large community.

The division of the city, as authorized and carried out under these Statutes, shows clearly the exercise of arbitrary power both by the Legislature and by the Commission at the expense of the rights of the individual to the protection of equal laws.

Nor does the petitioner deny the authority of the case of *Salem* v. *Maynes*, 123 Mass. 372, where it is held by the Massachusetts Court that wooden buildings may be restricted or prohibited within a municipality or within any district thereof. The regulation there involved was clearly a reasonable one and did not go beyond the necessity as a means of protection against fire, and it would be unreasonable in a city like Boston to prohibit the erection of wooden buildings throughout the whole city.

In the case at bar, on the other hand, there is no such crying necessity, and the remedy adopted is most drastic. The inequality, therefore, is emphasized here both by the *lack of necessity* for any such regulation and by the *incisiveness* of the limitation imposed.

The classification in the case of *People* v. *D'Oench,* 111 N. Y. 359, was based on the character of the building to be erected.

So in *Tenement House Department* v. *Moeschen,* 179 N. Y. 325.

It is submitted that, if there is to be any classification, a classification making the height dependent upon either the use to which the building is to be put or upon the character of the construction is the only logical classification. The former was the classification adopted in the law under consideration in *People* v. *D'Oench.* A combination of the two is adopted in the present building regulations in New York.

Cf. Ash, Building Code of New York City, Part VII.

And Massachusetts has long had similar laws. Thus in Acts of 1892, Chapter 419, Sections 23 and 24, it is provided that every building to be erected to the height of more than seventy (70) feet must be of fire-proof construction. See also Acts of 1907, Chapter 550, Section 40, providing that no wooden building hereafter erected, to be used as a habitation, shall be more than three (3) stories in height above the basement, nor more than forty-five (45) feet in height above the street level.

Another grave objection is to be found in the *extent of the discretion* which is vested in the Commission, with reference to determining the territorial divisions.

It is true that the Legislature fixed a nominal standard upon which the division should be made, but the facts above stated, with reference to the including of the densely populated sections in the so-called business districts and the including of smaller outlying business sections in the so-called residential districts, well illustrate the extent of the discretion given to the Commission; and the Supreme Judicial Court of Massachusetts in the decision of this case has

found that the Commission did not exceed its powers. Compare the cases of

Yick Wo v. *Hopkins*, 118 U. S. 356.
Newton v. *Belger*, 143 Mass. 598.

(3) *The Statute gives exceptional rights to property holders in Districts "B" whose property is situated within fifty feet of the division line established, provided they also own land on the other side of the division line.*

The provision which effects this classification is found in Section 2 of Chapter 383 of the Act of 1905, in which it is stated that the order of the commission appointed under that statute

> "may provide for the erection of buildings as aforesaid to a height not exceeding 125 feet in that portion of said District B which lies within 50 feet from the boundary line separating said District B from the district designated by the commission on height of buildings in the city of Boston as District A in accordance with said Chapter 333 (Acts of 1904), *provided said boundary line divides the premises affected by such order from other adjoining premises both owned by the same person or persons.*" (Italics ours.)

The order of the Commission did so provide (p. 18 of record).

The condition imposed by this provision is dependent upon ownership of adjoining properties on either side of the division line and has no regard to whether the property is to be occupied by separate buildings or by a single building covering the whole property. This, it is believed, is purely arbitrary, and bears no reasonable relation to any purpose which the Legislature may have had in view.

(4) *It is provided that the height of buildings in Districts "B" above eighty feet shall depend upon the width of the building upon the street.*

This provision is to be found in the third report of the Commission, "Exhibit D," on page 18 of the record, and reads as follows:—

> "No building shall be erected to a height greater than eighty feet, unless its width on each and every public street upon which it stands will be at least one-half its height."

If there is anything, therefore, whether by reason of restrictions upon the land or by reason of the size or shape of the parcel of land which limits the width of the building on any street to forty feet or less, the building cannot be more than eighty feet in height.

The property of the plaintiff in error is situated at the corner of Arlington and Marlborough Streets, having a frontage on Arlington Street of forty-seven feet (p. 2 of record).

If it should be the fact that there are restrictions on the land requiring a set-back of seven feet or more from Marlborough Street, the frontage of the building on Arlington Street could not exceed forty feet, and the height, therefore, could not exceed eighty feet.

If the plaintiff in error owned an adjoining parcel of land on Arlington Street, he would not be subject to this limitation, and, as the frontage on Arlington Street would be wider, he could build higher.

It is further submitted that, even if the petitioner was at liberty to build to the full width of his lot on Arlington Street, still, under the ruling of the Commission, authorized by the Statute, he could build to a height of only *ninety-four* feet, and it is certainly *arbitrary and unjust* that the

height to which buildings may be built *should depend upon the width of individual holdings upon any street.*

We have here another illustration of the extent of the discretion delegated to the Commission; and here again the decision of the Supreme Judicial Court of Massachusetts in this case finds that the Commision acted within its power.

(5) *The Statutes create exceptions in favor of certain occupations.*

In Section 3 of Chapter 333 of the Acts of 1904, after limiting the height of buildings in Districts "A" to one hundred and twenty-five feet and in Districts "B" to eighty feet, it is provided (Section 3):—

> "These restrictions shall not apply to grain or coal elevators, or sugar refineries, in any district designated A," etc.

If the object of the Statutes were to protect the community against fire, a less appropriate exception could scarcely be made; and there can be no question but that the exception of certain occupations, in the absence of some reason for the exception which is based upon the purposes of the Act, is improper and unconstitutional.

In the case of *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, this Court held that the Statute of Illinois which made trusts or combinations for certain purposes illegal, but which expressly provided that the Statute

> "shall not apply to agricultural p oducts or live stock while in the hands of the producer or raiser"

was unconstitutional, in that it denied to the defendant before the Court the equal protection of the laws.

It is submitted that, if it should be assumed that there is a necessity for a general limitation in the height of buildings to eighty (80) or one hundred (100) feet, yet there can be found no reasonable necessity for the *inequalities* created under these Statutes.

The classifications are consistent with neither of the purposes of public health or public safety which the Legislature could properly have had in view.

If the purpose were to protect the public health, the necessity for such classification as has been made is sufficiently negatived by the fact that it is permitted to include in the so-called business or commercial districts such a mass of population as is contained in what is known as the North End.

Again, if the purpose were to protect the community against fire, there is nothing to be gained by such classification, for it is certainly more difficult to combat with fire in the crowded down-town districts and in the North End, with the narrow streets and alleys which are there to be found, than it is in the so-called residential sections of the city.

V.

DISCUSSION OF CASES RELIED UPON BY THE DEFENDANT IN ERROR.

The cases of

Salem v. *Maynes*, 123 Mass. 372,
Commonwealth v. *Alger*, 7 Cush. 53,
People v. *D'Oench*, 111 N. Y. 359,
Watertown v. *Mayo*, 109 Mass. 315,
Sawyer v. *Davis*, 136 Mass. 239,

will doubtless be cited by counsel for the defendant in error in support of the Statutes in question. Most of them were cited by Mr. Chief Justice Knowlton in the decision in this case in the Supreme Judicial Court of Massachusetts. The plaintiff in error believes none of these cases is in point as regards the case before this Court.

(1) *Salem* v. *Maynes*, 123 Mass. 372,

merely stands for the proposition that the Legislature may authorize cities and towns to restrict or prohibit the erection of wooden buildings within the municipality or within any district thereof. This is very different from an Act which prohibits owners erecting any building on their property or from a Statute which prohibits them from erecting a building more than a given number of feet in height. The former does not exclude the property owner from occupying or using any portion of his property, the latter does. It cannot be seriously contended that the regulation which is sustained in *Salem* v. *Maynes* is not an entirely reasonable one aimed at a real danger; and any less right on the part of municipalities would expose the community to grave consequences.

(2) *Commonwealth* v. *Alger*, 7 Cush. 53,

held that the Legislature had power to establish harbor lines in Boston Harbor beyond which no wharf should be extended or maintained, and to declare any wharf extended or maintained beyond such lines a public nuisance, although no compensation was provided for the proprietors of the flats above low water-mark which were affected by such order. This case is distinguishable from the case at bar, as follows:

(*a*) The proprietors of the flats were not deprived of any other use of those flats. They could walk upon them or they could dig shell-fish. In the case at bar the Statute operates to deprive the owners of *all* use of their property above the height limited.

(*b*) It appeared in *Commonwealth* v. *Alger* that the owners of the flats in question held them under the colony ordinance of 1647, expressly subject to the restriction that they should not stop or hinder the passage of boats and vessels, etc. (pp. 67, 70, 89, 93, 94), and in establishing these harbor lines the Legislature was merely defining the extent of the public rights of navigation. This was the basis of the decision, prescribing

> "a precise, practical rule for declaring, establishing, and securing such (public) right."

(Shaw, C. J., pp. 95, 96). That case merely related to *drawing a line between a recognized private right and a recognized public right.*

In the case at bar, on the other hand, it has long been recognized that the owner of land is entitled to the use of the same *ad coelum*.

(*c*) Again, in *Commonwealth* v. *Alger*, the object sought, viz.,

> "to prevent injurious obstructions in the harbor of Boston and to secure the free, common, and unob-

> structed use thereof . . . as a common and public right" was "an object of great importance and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest" (p. 84),

and the regulation went no farther than was reasonably necessary to attain that end.

Cf. *Grand Rapids* v. *Powers*, 89 Mich. 94.

The invasion of private rights was far less than in the present case.

(3) In *People* v. *D'Oench*, 111 N. Y. 359,

the Court said, *obiter*, that it was competent for the Legislature in the exercise of the police power to pass an Act limiting the height of all houses used as dwellings for more than one family within the city of New York. The case, however, was decided upon another point, viz., whether the Act in question applied to hotels.

Even if this dictum were to be taken as sound, there remains the fact that the classification in that case was not an arbitrary one depending upon territorial limits subject to change, but was based upon the character of the building. The owner could have built a business block, for example, above the specified height, and, therefore, was not deprived of *all* use of his property above that height.

(4) *Watertown* v. *Mayo*, 109 Mass. 315,

did not relate in any way to the construction of buildings. It merely held valid a Statute of Massachusetts providing that in cities or towns of more than four thousand inhabitants no building not then so used should be used without permission of the Mayor and Aldermen, or of the Selectmen, for

> "the business of slaughtering cattle, sheep or other animals or for melting or rendering establishments, or for other noxious or offensive trades or occupations."

This was clearly a proper provision for the protection of the community against nuisances and also for the protection of health.

(5) *Sawyer* v. *Davis*, 136 Mass. 239,

held that the Legislature might authorize the doing of certain acts, which, without such authorization, would constitute a private nuisance. The particular case was an Act authorizing manufacturers and others employing workmen for the purpose of giving notice to such employees to ring bells and use whistles and gongs of such size and weight in such manner and at such hours as the Board of Aldermen of cities and the Selectmen of towns may, in writing, designate. The plaintiff in that case was a manufacturer who had been previously restrained, by decree of Court, from ringing a bell on his mill before half-past six in the morning. The Legislature had subsequently passed the Act above referred to, and the Selectmen of the town had granted him a license, in accordance with the Act, to ring the bell as early as five o'clock in the morning. On a bill of review, setting out those facts and praying that the decree previously entered be modified so as to permit the plaintiff to act under his license, the Court on demurrer held the Statute constitutional.

CONCLUSION.

It is submitted that the foregoing considerations are sufficient to show that these Statutes are unconstitutional and void, in that:—

(1) They are not enacted in good faith for the protection of the public health or the public safety, or any other real public necessity, but that they are the outcome of a movement for purely æsthetic purposes.

(2) They involve a taking of property, without compensation, to an extent which is not justified by any public necessity, but which is entirely disproportionate to any such necessity.

(3) They involve a classification which is arbitrary in several different particulars and which bears no reasonable relation to any proper purpose for which the police power might be exercised.

The plaintiff in error, therefore, believes that they should be declared unconstitutional by this Court.

Respectfully submitted,

Burton Edward Ew

Charles H. Tyler

Owen D. Young.

Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 153.

FRANCIS C. WELCH, TRUSTEE, PLAINTIFF IN ERROR,

v.

GEORGE R. SWASEY ET AL., BOARD OF APPEAL FROM THE BUILDING COMMISSIONER OF THE CITY OF BOSTON, DEFENDANTS IN ERROR.

BRIEF FOR DEFENDANTS IN ERROR.

Statement of the Case.

The plaintiff in error is the owner of a certain parcel of land on Arlington street in the City of Boston. The defendants are members of the Board of Appeal existing under the provisions of the building acts of the City of Boston which board was constituted for the purpose of hearing appeals from the decisions of the Building Commissioner of the city in regard to permits for buildings in the City of Boston.

Since June 16, 1892, when chapter 419 of the Acts of 1892, referred to on page 3 of the Record, was passed, there has existed as part of the building laws of Boston a limitation on the height of buildings, the extreme limit being 125 feet except church spires, domes, chimneys and architectural ornaments.

In May, 1904, the Legislature of Massachusetts passed an act, being chapter 333 of the acts of said year, dividing the City of Boston into two districts, to be designated as District A and District B. By section 3 of that act it was provided that "in the City of Boston no buildings shall be erected to a height of more than 125 feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than 80 feet above the grade of

the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers or cupolas erected for merely ornamental purposes of fire-proof materials on buildings of the above height or less in any district."

By the terms of this act the boundaries of these districts were to continue for a period of fifteen years.

In 1905 the Legislature passed another act, it being chapter 383 of the Acts of 1905. By this act a commission of three members was to be appointed by the Mayor of Boston to determine in accordance with certain conditions the height of buildings within the district designated as District B. This commission, after notice and public hearings, were to make an order establishing the boundaries of such parts of any of said District B as it may designate in which buildings may be erected to a height exceeding 80 feet, but not exceeding 100 feet and the height between 80 feet and 100 feet to which buildings may be so erected, and conditions under which buildings may be erected to such height.

The commission might by such order provide for the erection of buildings as aforesaid to a height not exceeding 125 feet in that portion of District B which lies within 50 feet from the boundary lines separating said District B from the district designated as District A in accordance with chapter 383 of the Acts of 1905, provided that said boundary line divides the premises affected by such order from other adjoining premises both owned by the same person or persons.

It was further provided by section 4 of this act that no limitation of the height of buildings in the City of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstaffs, railings, weather-vanes, soil pipes, steam exhausts, signs, roof houses not exceeding 12 feet square and 12 feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

On September 14, 1905, the plaintiff filed with the Building Commissioner of the City of Boston his application for a permit to build a building of the height of 124 feet 6 inches, the number of feet in height from level of the sidewalk to highest part of wall 131 feet 6 inches, number of feet in height from sidewalk to eaves 127 feet 6 inches. (See pages 3 and 6 of the Record.)

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The land of the plaintiff on which he proposed to erect this building was in District B and the application to build was refused by the Building Commissioner on September 26, 1905, on the ground that the proposed structure would exceed in height the limit permitted by chapter 333, of the Acts of 1904 and chapter 383, of the Acts of 1905 and the reports of the respective commissioners thereunder. (See page 3 of the Record.)

On said date the plaintiff appealed from the decision of the Building Commissioner to the Board of Appeal on the ground that the acts and reports of the commissioners thereunder were unconstitutional and void. (See page 3 of the Record.)

A hearing upon said appeal was held before said Board of Appeal on September 29, 1905 and after said hearing the Board of Appeal rendered the following decision:

"Upon hearing before this board on September 29, the appellant, through his attorney, Mr. Owen D. Young, admits and concedes that on the facts incidental to his application to erect the building in question, a permit was rightfully refused by the commissioner, if Statute 1904, chapter 333, and Statute 1905, chapter 383, and the respective reports of the commissions thereunder be constitutional, and on this admission and concession, the board directs the commissioner to withhold a permit.

ARTHUR G. EVERETT, *Secretary.*"

On December 31, 1905, the plaintiff by his attorney filed a petition for mandamus in the Supreme Judicial Court of the State of Massachusetts, a copy of which is to be found on pages 2, 3, 4 and 5 of the Record.

On February 20, 1906, the case was reserved by a single justice for the decision of the full court on the question whether the statutes referred to were constitutional and valid. There was a hearing before the Supreme Judicial Court, being the highest court of the State of Massachusetts, held on January 1, 1907, and it was ordered that the clerk make the following entry under said case: "Petition dismissed." A copy of the opinion of the Supreme Judicial Court in this case is to be found on pages 24 to 28, inclusive, of the Record and on page 364 of Volume 193, Massachusetts Reports.

The plaintiff filed seventeen specifications of error and brought this writ of error. The only question in the case is the constitution-

CLOSE IN CENTER

ality of that portion of the building laws of Boston which limit the height of buildings.

Although the plaintiffs in error present seventeen objections to the constitutionality of the provisions of law under which they were forbidden to erect a building, 124 feet 6 inches in height, the objections are all based on the Fourteenth Amendment and amount in substance to but two; first, they object to any restriction which prevents their erecting a building on their own land as high as they see fit, at least unless compensation is awarded them for the damage to their property by the imposition of such restriction; and secondly, assuming that a general uncompensated restriction is valid they object to a restriction which prevents the erection of a building on their land to a height which would be permitted elsewhere in the state and even in the same city.

I.

The first question is whether an act limiting the height of buildings is constitutional at all. The statute was enacted, according to the decision of the Supreme Judicial Court of the state in behalf of the public health and safety, and the Supreme Court of the United States will not strike it down as an unconstitutional interference with private property unless it can plainly see that it has no real and substantial relation to those objects and is a mere arbitrary attack upon the owners of land.

Slaughter-House Cases, 16 Wall. 36.
Bartemeyer *v.* Iowa, 18 Wall. 129.
Munn *v.* Illinois, 94 U. S. 113.
Beer Co. *v.* Massachusetts, 97 U. S. 25.
Barbier *v.* Connolly, 113 U. S. 27.
Mugler *v.* Kansas, 123 U. S. 623.
Powell *v.* Pennsylvania, 127 U. S. 678.
Lawton *v.* Steele, 152 U. S. 133.
Holden *v.* Hardy, 169 U. S. 366.
Fischer *v.* St. Louis, 194 U. S. 361.
California Reduction Co. *v.* Sanitary Reduction Works, 199 U. S. 306.
Bacon *v.* Walker, 204 U. S. 311.
Hudson County Water Co. *v.* McCarter, 209 U. S. 349.

The right of the state to regulate the construction of buildings has been recognized and exercised ever since the population of our cities became dense enough to make regulation desirable and necessary for the protection of the inhabitants from fire and disease. The first building law in Boston was chapter 13 of the Acts of 1692–93, and provided that henceforth no building should be erected in Boston, "but of stone or brick, and covered with slate or tyle." More and more detailed provisions have become necessary until the latest building law (chapter 530 of the Acts of 1907) covers eighty closely printed pages. No one, however, contends that such laws are unconstitutional. It was said by the Court in Lawton *v.* Steele, 152 U. S. 133, that the prohibition of wooden buildings in cities was a proper exercise of the police power. The prohibition of cow stables within city limits was held valid in Fischer *v.* St. Louis, 194 U. S. 361. Building laws have been frequently upheld in the state courts.

Ex parte Fiske, 72 Cal. 125.
Baumgartner *v.* Hasty, 100 Ind. 575.
Mt. Vernon First National Bank *v.* Sarlls, 129 Ind. 201.
Wadleigh *v.* Gilman, 12 Me. 403.
Easton *v.* Covey, 74 Md. 262.
Watertown *v.* Mayo, 109 Mass. 315.
Salem *v.* Maynes, 123 Mass. 372.
Brady *v.* Northwestern Insurance Co. 11 Mich. 425.
New York Fire Department *v.* Gilmour, 149 N. Y. 453.
Rochester *v.* West, 164 N. Y. 510.
Republica *v.* Duquet, 2 Yeates (Pa.), 493.
Douglass *v.* Commonwealth, 2 Rawle (Pa.), 262.
Klinger *v.* Bickel, 117 Pa. St. 326.
City Council *v.* Elford, 1 McMullan (S. C.), 234.
Knoxville *v.* Bird, 12 Lea (Tenn.), 121.
Baxter *v.* Seattle, 3 Wash. 352.
Charlestown *v.* Reed, 27 W. Va. 681.

Until the introduction within recent years of steel frame construction, very tall buildings were not practicable, and it is only lately that there has been any need of legislation restricting the height of buildings, for the natural difficulties were formerly sufficient protection to the public.

In 1892 (chapter 419, section 25 of the Acts of 1892) it was provided as a part of the building law that no building thereafter erected in Boston should exceed 125 feet in height. Various changes and amendments were made until the act now under discussion was passed. Similar acts elsewhere in this country are still uncommon, but the courts and text writers which have discussed them have invariably considered them constitutional.

In Hudson Water Co. *v.* McCarter, 209 U. S. 349, 355, the Court said, "For instance, the police power may limit the height of buildings in a city, without compensation."

In People *v.* D'Oeuch, 111 New York, 359, a statute was held constitutional which limited the height of dwelling houses subsequently erected to 70 feet upon all streets not exceeding 60 feet in width and 80 feet upon all streets exceeding 60 feet in width, no compensation being provided. The text writers agree with this view of the law, as is shown by the following extracts:

Abbott, Municipal Corporations, Volume 1, page 237: "Through the cupidity or negligence of property owners, buildings may become unsafe for use, and the proper exercise of the police power by the state includes the passing of regulations remedying such condition. It also includes the right to regulate or control in the first instance, having as a purpose the protection of life, health and property, either the dimensions, the manner or the place of construction."

Tiedeman, State and Federal Control, Volume 2, page 754: "The disposition to construct inordinately tall buildings seems to be growing; every new building of the kind known as skyscrapers seems to reach a higher altitude than the preceding ones. Streets of a width sufficient for the construction of three and four story buildings become narrow and poorly ventilated alleys, when rows of buildings line them with their eighteen to twenty-three stories. Unless the height of such buildings be limited by law there will be no other limit to the height of future structures, and both the health and safety of the population will be endangered. There can be no doubt of the constitutionality of a law which limits the height of buildings."

The idea that the public safety and health require the restriction of the height of buildings did not originate with nor is it confined to the legislators of Massachusetts.

The building act applicable to London (57 and 58 Victoria, chapter 213) provides in section 47 that, "A building (not being a church or

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chapel) shall not be erected of or be subsequently increased to a greater height than 80 feet (exclusive of two stories in the roof and of ornamental towers, turrets or other architectural features or decorations) without the consent of the council," and in sections 41 and 42, that domestic buildings shall not rise at the back above a line drawn at an angle of 63½ degrees to the horizon from the back of the open space behind the building.

In Paris the height of buildings is limited to twenty metres. (Shaw, Municipal Government in Europe, page 90.) In Rome the limit is one and a half times the width of the street, with a minimum limit of 14 metres and a maximum of 24. (*Id.*, page 281.) In Berlin, Vienna and all other large European cities there are similar limits.

In the Building Code, recommended by the National Board of Fire Underwriters of the United States, it is provided in section 30 that no building or structure hereafter erected, except a church spire, shall exceed two and one-half times the width of the widest street upon which it stands, but in no case shall any building exceed 125 feet, nor if to be used above the ground floor as warehouses or stores for the storage or sale of merchandise shall it exceed 100 feet in height.

In a case of this kind involving the question whether a certain state statute is aimed and adapted to promote the public welfare, the Supreme Court of the United States should and does well hesitate to overturn a decision of the highest court of the state. The validity of the statute may depend on certain facts, general, notorious and acknowledged within the state, and with which the state courts may be assumed to be exceptionally familiar. They understand the situation which led to the demand for the enactment of the statute, and they appreciate the disastrous results which in all probability would flow from a denial of its validity.

> Clark *v.* Nash, 198 U. S. 361.
> Strickley *v.* Highland Boy Gold Mining Co., 200 U. S. 527.
> Bacon *v.* Walker, 204 U. S. 311.

What is a reasonable regulation in Boston, with its notoriously crooked and narrow streets, might be unreasonable on the broad avenues of Washington and entirely unnecessary in a sparsely settled agricultural or pastoral community. The people of Massachusetts,

CLOSE IN CENTER

through their Legislature, have deemed this restriction wise, and its Supreme Judicial Court has called it reasonable; their decision should carry great weight.

II.

Granting that under whatever heading the Legislature purports to act, if there is an actual taking of property there must be compensation; that a taking of property without compensation is a taking without due process of law; and that a restriction may be so severe as to amount to a taking and so require compensation if it is to be imposed without violating well established constitutional limitations, nevertheless it is clear that the plaintiffs in error are not entitled to compensation because there was no taking of this property. The Supreme Court of the United States has never accepted the fanciful doctrine that whatever decreases the value of land is the taking, *pro tanto*, of the owner's property and so unconstitutional unless he is paid for the damage, but has steadfastly adhered to the older and sounder rule that land is not taken unless it is physically entered upon or the owner substantially deprived of the beneficial use.

Smith *v.* Washington, 20 How. 135.
Transportation Company *v.* Chicago, 99 U. S. 635.
Osborne *v.* Missouri Pacific R. R. Company, 147 U. S. 248.
Gibson *v.* United States, 166 U. S. 275.
Meyer *v.* Richmond, 172 U. S. 95.
Sharp *v.* United States, 191 U. S. 341.
Bedford *v.* United States, 192 U. S. 217.

Regulations and restrictions upon the use of real property have been imposed which limit its use and impair its value more severely than those in the case at bar without giving rise to any constitutional obligation to compensate the owner.

Slaughter-House Cases, 16 Wall. 36.
Beer Co. *v.* Massachusetts, 97 U. S. 25.
Fertilizing Co. *v.* Hyde Park, 97 U. S. 659.
Barbier *v.* Connolly, 113 U. S. 27.
Mugler *v.* Kansas, 123 U. S. 623.
Fischer *v.* St. Louis, 194 U. S. 361.

These decisions dispose of the argument that, even if the restriction is a valid exercise of governmental power it cannot be constitutionally enforced unless compensation to the individuals injured by the restrictions is provided.

III.

The final objection of the plaintiffs in error to the constitutionality of the statute is that it is not general in its operation throughout the city and the state; that in the business section of the city owners may build to the height of 125 feet, and elsewhere throughout the state without limit. But there is no requirement in the Fourteenth Amendment or anywhere else in the Constitution of the United States that the laws of a state be uniform in their application throughout the state. As was said by Judge Cooley in his Constitutional Limitations (seventh edition, page 554): "Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. . . . The authority that legislates for the state at large must determine whether particular rules shall extend to the whole state and all its citizens, or on the other hand, to a subdivision of the state or a single class of its citizens only. The circumstances of a particular locality, or the prevailing public sentiment in that section of the state may require or make acceptable different police regulations from those demanded in another. . . . The Legislature may therefore prescribe or authorize different laws of police . . . provided the State Constitution does not forbid. These discriminations are made constantly; and the fact that the laws are of special or local operation only is not supposed to render them obnoxious in principle."

Similarly, the Supreme Court held in Missouri *v.* Lewis, 101 U. S. 22, that the Fourteenth Amendment "has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made," and in Hayes *v.* Missouri, 120 U. S. 68, that, "the Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate." In Budd *v.* New York, 143 U. S. 517, 548, a state statute was held constitutional against the objection that it applied only in municipalities having a population of 130,000 or over, and in Gardner *v.* Michigan, 199 U. S. 325, a law

applicable to but one county was sustained. Other instances where police regulations were sustained, although applicable only to a certain locality, are the Slaughter-House Cases, 16 Wallace, 36, and Barbier *v.* Connolly, 113 U. S. 27.

It is then clear that a police regulation is not unconstitutional merely because it is applicable to a certain section of the state only; granting that a purely arbitrary distinction would be invalid, such as a burdensome restriction applied only to the democratic wards, or to those inhabitated principally by people of a certain race or religion, yet all that is required is that the discrimination between localities be based upon some conceivably rational distinction; with the policy of the law the court has no concern.

The diversity of regulation is between the business and the residential portions of the city, and it is not contended that the line between the two sections as drawn was not reasonably accurate, or based upon distinctions not merely conceivably rational but actually sound.

In the first place, the Legislature is authorized and even required in enacting a police regulation to consider the hardship it may inflict upon individuals as well as the benefit to the public. One of the well established criteria of the constitutionality of a statute enacted in attempted execution of the police power is that it be not unduly oppressive upon individuals.

Lawton *v.* Steele, 152 U. S. 133, is a good example of the application of this rule. It was well said by the Massachusetts Supreme Judicial Court in the case at bar that the value of land and the demand for space in the business district of Boston might make a restriction burdensome there that would be reasonable in other parts of the city.

Secondly, there are obvious reasons why the Legislature in passing this act as a health measure should see the greater need of sunlight and air in the residential quarters of the city, occupied during the day by women and children, than in the business district where men are employed. The Legislature is well justified in throwing a greater protection around women and children than it allows men, even if property rights are thereby somewhat interfered with.

Muller *v.* Oregon, 208 U. S. 412.

Thirdly, there may have been reasons well known to the Legislature which enacted the statute affecting the relative fire protection of the two districts. It may well be that it was considered safer to permit taller buildings in a small section of the city, where all the buildings are of fireproof construction, where the fire engines are more numerous and accessible, where an unlimited supply of salt water could be readily introduced, where there are few women and children in the day time, and where no one sleeps at night, than in the much more extensive residential quarters where there are many wooden buildings, where the fire apparatus is more widely scattered, where, being remote fromt he water front, it would be difficult to obtain salt water, where women and children spend the day, and where a nocturnal fire undiscovered while the occupants slept might well cause a frightful loss of life in an apartment house of towering height. These and other considerations may well have influenced the Legislature and are amply sufficient to justify the distinction between the two parts of the city.

As far as the absence of regulation in the rest of the state is concerned, it has not been enacted, doubtless because the Legislature has not deemed it necessary. The cases already cited regarding local legislation are conclusive that a statute is not unconstitutional merely because it applies only to the largest city of the state when the evil it aims to restrict has not as yet made itself felt elsewhere.

IV.

The plaintiff in error seemingly does not rely upon the fact that chapter 383 of the Acts of 1905 delegated to a commission the power to fix different heights in different places in parts included in Class B, probably owing to the fact that the constitutionality or non-constitutionality of this provision has nothing to do with the Fourteenth Amendment of the Constitution of the United States and to the further fact that the *locus* where he desired to erect his building was within Class B of the Acts of 1904, chapter 333.

Even if these were not facts, that clause in the statute was constitutional, as the Supreme Court of Massachusetts say in the case at bar (see 193 Massachusetts, page 375): "The word of the commissioners under the first act was not legislation but the ascertainment

of facts and the application of the statute to them for the purposes of administration. Such subsidiary work by a commission is justified in many cases." The delegation to a commission to fix the application of the statute is constitutional.

See Buckfield *v.* Stranahan, 192 U. S. 470.
Union Bridge Co. *v.* United States, 204 U. S. 364.

The United States Supreme Court follows the construction of the state statute given it by the highest court of the state.

Delameter *v.* South Dakota, 205 U. S. 93.
Chambers *v.* Baltimore & Ohio Railroad Company 207 U. S. 142.

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